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COMMONS AND COMMON FIELDS

OR

THE HISTORY AND POLICY OF THE LAWS RELATING TO COMMONS AND ENCLOSURES IN ENGLAND.

BEING THE YORKE PRIZE ESSAY OF THE UNIVERSITY OF CAMBRIDGE FOR THE YEAR 1886.

BY

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PREFACE.

THE Yorke Prize of the University of Cambridge, to the establishment of which this work owes its existence, was founded about fourteen years ago by Edmund Yorke, late Fellow of St Catharine's College, Cambridge, and, under a scheme of the Court of Chancery, is given annually to that graduate of the University, of not more than seven years' standing from his first degree, who shall be the author of the best essay on some subject relating to the "Law of Property, its Principles, and History in various ages and Countries." The subject prescribed for the year 1886 by the Adjudicators (R. Romer, Q.C., and C. S. Kenny, M.P.), was "The History and Policy of the Laws relating to Commons and Enclosures in the United Kingdom." The Prize was awarded to the Essay bearing the motto: "Enclosures make fat beasts and lean poor people", which is now published in accordance with the conditions of the Award.

The subject originally prescribed for the Yorke Prize being so wide, the following pages have been intentionally limited to England, and in that country to two aspects of the subject proposed; (1):—an examination of the accuracy of the legal theory of the origin of rights of common, as compared with the early history of those rights as depicted by historians, a discussion which, as historical students do not agree among themselves on the matter, must necessarily include some investigation and criticism of the evidence available; (2):—a historical sketch of the policy of the legislature and the practice of landowners with regard to the distribution of common lands into several ownership, and the enclosure of open fields and wastes. This in its turn must include both the agricultural and economical question

of the common fields, and the social and economical question of commons as open spaces.

The mixed question of law and history is dealt with in the first three chapters of the essay; it is one of great difficulty, and great importance. The recent work of Mr Seebohm, whatever be its merits and faults in other respects, has certainly compelled those who assert the existence of a Free Village Community in England to carefully restate their position, which had become through premature popularisation and the crude generalisation and parrot-like repetition of crammers and their victims indefensible in some of its doctrines. Especially the attack on the legal theory of rights of common, (which is that they originate in law from the grant of a lord,) commenced by Mr Joshua Williams and Mr Digby, appears to overlook the state of the historical evidence as to the condition of things at the time when the lord's grant must have been made or implied. The following pages advocate the view that the legal theory is historically accurate, if stated with proper limitations; that except in the Eastern and Danish counties, the existence of Free Village Communities in England for some centuries before the Conquest, is, as Kemble recognised, historically very doubtful; and that Common Appendant, which is usually put forward as the direct survival of the Free Community, can be clearly shown to have no such origin in the vast majority of the manors of England.

This discussion also involves an examination of the very difficult question of the relation of the Statute of Merton to earlier law; and an attempt to prove that the distinction between Commons Appendant and Appurtenant only originates in the 15th century. The subject matter of the first two chapters has already appeared in the Law Quarterly Review for October, 1887.

The question of the origin of Manors and Manorial Courts, and the early relations of the lord to his tenants, are still far from settled. Now that copyhold tenures are rapidly dying out, when Manorial Courts have become almost obsolete, and in

most cases the lord of the manor no longer derives more than a nominal profit therefrom, it is much to be desired that each lord of a manor would regard it as a duty of his position to provide for at any rate the safety, if not for the publicity, of his Court-rolls. Large as is the mass of materials now made public, it is only by a careful and minute examination of the history of each manor, and comparison of contemporaneous rolls, that any conclusions of value as to the early history of the English Village Community can be reached. Such publications as the Domesday of St Paul's, edited by Archdeacon Hale, or the Custumals of Battle Abbey, just edited by Mr Scargill Bird for the Camden Society, are worth in the light they throw on early English history, whole libraries of imaginative descriptions of the Mark in England, based on institutions alleged to exist in some other country and at some other time.

While this part of the discussion from its technicality loses its full meaning to all but specialists, the subject treated of in the second part of the essay is of interest to every English citizen and is becoming of more and more importance every day. The growth of population and the adulteration of the chief means of living, pure air, for which our ever-increasing factories are responsible, bring more and more to the front the need of open spaces, accessible from our great towns. The speculative builder and the wealthy landowner alike prey upon roadside wastes, and neighbouring Commons. Both the poor, who are deprived of any interest in the land, and the public, more and more restricted to the hard high road, are affected by the Policy of Enclosure and Individualism.

The following pages give the history of Commons and Common Fields in this country. After explaining what is known of their early condition, the great change from arable land to pasture in the 15th and 16th centuries, with its results; the reclamation of the fens, and the disorders of the Civil War, in the 17th century; the great movement towards enclosures in the 18th century, based on a policy of agricultural advantage,

and finding its climax in the establishment and work of the Board of Agriculture at the close of the century; the reaction from this one-sided narrow view of the problem as it arises in the present century; the recognition of the vital interests of the public in open spaces; the struggles with the encroachments of Lords of the Manor on the one hand, and the shortsightedness and apathy of Parliament and of the Crown officials on the other; the foundation of the Common Preservation Society; all these matters are dealt with in turn. The last chapter contains some suggestions as to Reforms needed to ensure the success of the Policy of open spaces at present in favour.

The present session has seen the passage by the Government of an Allotment Act, which is certainly a step in the right direction. Its full merits can only be judged after experience of its operation: the activity of sanitary authorities, the exact constitution of the forthcoming county authority, "any representative body elected by the inhabitants of the county which may be established under any Act of any future session of Parliament", the policy of the Local Government Board which is to act for the local county authority till "any future session of parliament" establishes it, are as yet unknown quantities. The restriction of allotments in size to one acre, and the absence of any provision that the allotment land shall be near the labouring population, a condition essential to success and by its absence the cause of much past failure, seem unfortunate, but in the present political position we may be thankful even for small mercies.

The importance of the question of open spaces to England of to-day, still more to the England of the future, can hardly be exaggerated. It is hoped that the following pages may assist the public understanding of the problem, and add in however small degree to the forces at work to keep the land of England from becoming closed to the people of England.

T. E. S.

1 Essex Court, Temple.
September 27, 1887.

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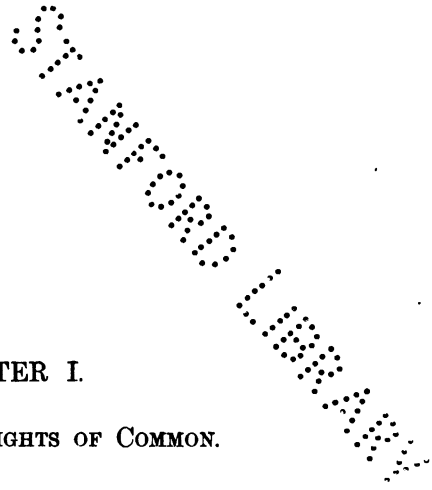
ADDENDA AND ERRATA.

pp. 27, 33. It has been pointed out to me that Bracton's distinction between *tenere in dominio*, *tenere in servitio*, is not as I have stated it in these pages. A man *tenet in dominio* if he has no freehold tenant under him; if he has, *tenet in servitio*. If so, the *tenentes operarii* were not as I have suggested *tenentes in servitio*. The lord of the manor held the land they occupied *in dominio*; yet oddly enough it was not his *dominicum*. Indeed as all the *libere tenentes* in the manor in all probability held portions of the *dominicum*, the lord held great part of his *dominicum*, *in servitio*, and all that was not *dominicum* he held *in dominio*, which is curious.

p. 167. The Metropolitan Open Spaces Acts; (40 and 41 Vic. c. 35; 44 and 45 Vic. c. 34:) have been extended to the United Kingdom by an Act of the present session (50 and 51 Vic. c. 32); and, together with the Disused Burial Grounds Act 1884, (47 and 48 Vic. c. 72), provide another method by which open spaces in towns and elsewhere can be secured and maintained. They do not however appear to affect common lands.



CHAPTER I.

The Origin of Rights of Common.

The origin and history of Common Lands in England are inseparably bound up with the history of the Manor. It would be too much to say that there were no rights of Common except in connexion with Manors; for the rights of Common in the royal forests rest on a separate footing; there are Common Lands held by towns, and the position of the *vill* or township with regard to the land surrounding it will require careful consideration. But in describing the nature of Common rights, in seeking to explain their origin and the causes which tended to defeat them, we are involved in the great controversy as to the antiquity of manors and the source of manorial rights.

From the Conquest to the 14th century we find the same agricultural conditions prevailing over the greater part of England. Small gatherings of houses and cots appear as oases in the moorland and forest, more or less frequent according to the early or late settlement of the district, and its freedom from, or exposure to, the ravages of war and the punishment of rebellion. These oases, townships or vills if of some extent, hamlets if of but a few houses, gather round one or more mansions of superior size and importance, the Manor houses, or abodes of the Lords of the respective Manors. Round each township stretch the great ploughed fields, usually three in number, open and uninclosed. Each field is divided into a series of parallel strips a furlong in length, a rod wide, four of which would make an acre, the strips being separated by ridges

of turf called *balks*, while along the head of each series of strips runs a broad band of turf known as a *headland*, on which the plough is turned, when it does not by custom turn on some fellow-tenant's land, and which serves as a road to the various strips in the fields. These strips are allotted in rotation to a certain number of the dwellers in the township, a very common holding being that known as a *virgate* or yardland, consisting of about 30 acres, in which case each holder of a virgate would have a number of strips scattered through the open fields in apparent disorder, until the key to the confusion is found in the order of rotation.

Mr Seebohm's exhaustive researches[1] have conclusively connected this system of open fields and rotation of strips with the system of common ploughing, each holder of land providing so many oxen for the common plough, two being the contribution of the holder of a virgate, and eight the normal number drawing the plough, though this would vary with the character of the soil. The three great fields are tilled on a system of rotation of crops, each field in turn lying fallow for a year during which it is open to the cattle of all the holders of land in the fields, while the two fields under cultivation are open to the cattle from the time of harvest till the corn was sown again. At the date of Domesday, (1086), the holders of land in the common fields comprise the Lord[2]; the free tenants, *socmanni* or *liberi homines*, when there are any; the *villani* or Saxon *geburs*, the holders of virgates or half virgates; and the *bordarii* or *cotarii*, holders of small plots of 5 acres or so, who have fewer rights, and fewer duties. Besides ploughing the common-fields, the *villani* as part of their tenure have to supply the labour necessary to cultivate the arable land that the Lord of the Manor keeps in his own hands as his domain, *dominicum*, or demesne.

There are next the meadows used for hay, divided during the growth of the crop among the villeins and other tenants by

[1] *The English Village Community*, Lond. 1883.

[2] See Fitzherbert on *Surveying*, (1523), who speaks of the lord as so holding land, though this may be by forfeiture or surrender.

a system of shifting rotation, from which they are frequently known as "lot-meadows", and open as common pasture to their cattle from the time of hay harvest till the ensuing spring. There are also pastures specially appropriated to oxen or sheep, usually held in common by the villeins, sometimes appropriated to particular owners.

On the Lord's domain there are, at any rate at the time of Domesday in the Eastern and Danish counties, free tenants cultivating portions of his land, with rights of common pasture, the origin of which will require further discussion, since they are claimed by some as the source of what is now known as *common appendant*, the common rights possessed by the villeins being ascribed as at any rate one of the origins of *common appurtenant*. The rest of the domain is cultivated by the services due in labour from the villeins and cotters to the Lord.

Round this cultivated oasis stretch woods in which the pigs of the community feed, and great moorland wastes and marshes, furnishing a poor pasture for cattle, with no boundary marking where the claims of the manor or township end, and giving rise to strayings justified as *common pur cause de vicinage*.

Large tracts of country are covered by the Forests, or lands preserved for the King's hunting by the forest laws "to the end that the same may be the better preserved and kept for a place of recreation and pastime, meet for the royal dignity of a prince[1]." The lands in the royal forests do not necessarily belong to the King; but all soil within the forest bounds is subject to oppressive restrictions in its use, the welfare of the King's game and deer being the all important object. The inhabitants and tenants have Common in the waste lands within the forest, except in the *fence-month*, when the deer are breeding; no old fence at any time may stand more than 4 feet in height, and no new fence can be erected without the crown licence, that the deer may have free run throughout the forest[2].

The manorial community in Domesday may be well illustrated by the survey of the *villa* of Westminster. The directions

[1] Manwood, *Law of Forests*, c. 1. § 1. [2] Williams *On Commons*, p. 231.

to the surveyors, from whose reports Domesday was compiled, of which the heading of the *Inquisitio Eliensis*[1] may serve as an example, required them to set out, "*quomodo vocatur mansio, quis tenuit eam T. R. E*[2]*: quis modo tenet; quot hidae; quot carrucae in dominio; quot hominum; quot villani; quot cotarii, quot servi; quot liberi homines; quot sochemanni*[3]*; quantum silvae; quantum prati; quot pascuorum.....quantum ibi quisque liber homo vel sochemannus habuit vel habet.*" And the account of the *villa* of Westminster reads thus[4]:—

"In the villa where is situate the church of St Peter, the abbot of the same place holds 13½ hides. There is land for 11 plough teams.

"To the demesne belong 9 hides and one virgate, and there are 4 plough teams. The villeins have 6 plough teams, and one more might be made.

"There are 1 villanus holding 1 hide, 9 villani holding each a virgate, 9 villani holding each half a virgate, 1 cotarius with 5 acres, 41 cotarii rendering a shilling each yearly for their gardens.

"There is meadow for 11 plough teams; pasture for the cattle of the village; wood for 100 pigs..... In the same villa Bainardus holds 3 hides of the abbot. There is land for two plough teams, and they are there, in demesne, and one cottier. Wood for 100 pigs; pasture for cattle...&c."

A good example of the rights of common that would result from such a system is furnished by a case in the Year-books for 1337[5]; where W. claimed common of pasture in the vill of F. "in 200 acres of" (arable) "land, 100 acres of meadow, 300 acres of wood, and 500 acres of moor and pasture", (probably all the land of the vill); "in one third part of the land every year throughout the whole of the year" (this being that one of the three arable fields which by rotation lay fallow); "and in the other two parts of the land each from the time that the

[1] f. 497, Stubbs, *S. C.* 85.

[2] *Tempore Regis Edwardi.*

[3] In these two classes would be found the free tenants in a manor; but see below, pp. 36, 37.

[4] Domesday, f. 128, a: also cited and translated by Seebohm, *V. C.* p. 98.

[5] 11 and 12 Edw. III. p. 31, Rolls edit.

corn should be cut shocked and carried away until the land should be again resown"; (these being the two common fields in cultivation at any time); "pasture in the meadow every year from the time that the hay was mown and got in until the Annunciation of our Lady; and in the wood the moor and the pasture at all times and during the whole year for all manner of beasts." This is the claim of common that would probably be made by every land owner in a vill[1].

As to the origin of these rights of common and indeed of manorial rights in general two theories have been held, which may be called the *legal* and the *historical* theories; though one form of the legal theory, that advocated by Mr Seebohm, professes to rest very much on historical evidence.

The legal theory in its barest and simplest form is that, as the lord of the manor is the absolute owner of the soil in his manor, all the rights which the freeholders and copyholders[2] in the manor enjoy depended originally on the grant or mere will and sufferance of the lord. As expressed by Blackstone[3]:—"On the arrival of the Normans here...they...might give some sparks of enfranchisement to such wretched persons as fell to their share by admitting them to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called villeinage, and the tenants villeins"... "Villeins[4]...in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the Common law, of which custom

[1] The fact that W. claims this common in the vill of F. as appurtenant to his land in the vill of C.—saying nothing about manors—is notable, (see below, pp. 40, 52). A similar claim by inhabitants as a custom was in *Gateward's Case* in 1607 (6 Co. Rep. 59, b) considered "repugnant and insufficient."

[2] Those whose title to their land is by Copy of the Court Roll of the Manor.

[3] II. 92.

[4] p. 95.

is the life, now gave them title to prescribe against their lords, and on performance of the same services to hold their lands, in spite of any determination of the lord's will....Thus Copyhold tenures, as Coke observes, although very meanly descended, yet come of an ancient house; for from what has been premised it appears that copyholders are in truth no other but villeins, who by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will."

The freeholders in a manor are also alleged to hold in each case by a grant from the lord of the manor; and as all manorial rights in this theory result from the lord's grant, it follows that all are referred to such a grant; even in the case of *Common Appendant*, the right of common possessed by all freehold tenants of land in a manor anciently arable, which is presumed to result from a grant by the lord to each individual freeholder, and not to belong to all freeholders in the manor as a matter of common right[1]. From this theory also it follows that copyholders cannot claim by prescription against their lord, because, as they hold by grant from him, to make such a claim they must prescribe in his name, and so the lord would appear to bring an action against himself; hence they are allowed exceptionally to claim by custom.

In Blackstone's view therefore, common rights are subsequent in their origin to manors, originating in grants of the land by the lords of those manors, or in sufferance by the lord of practices which become Customs of Common[2]; and though he dates manors from "the Saxon Constitution[3]", he refers the status of villeinage, and therefore most rights of Common Appurtenant, and all rights enjoyed by tenants of a manor other than freeholders, to the coming of the Normans.

Lord Coke had previously expressed the same opinion in his "Complete Copyholder[4]":—"For, as I conjecture in the

[1] *Earl Dunraven* v. *Llewellyn*, 15 Q. B. 791, discussed by Mr Joshua Williams in Appendix C. to Williams' *Real Property*. See also *Tyrringham's Case*, 4 Rep. 37, for Lord Coke's view of the matter.

[2] Bl. II. 33.

[3] Bl. II. 90.

[4] pp. 7, 8.

Saxon times, sure I am in the Norman times, those copyholders were so far subject to the lord's will that...the lords upon the least occasion...would expel out of house and home their poor copyholders, leaving them helplesse and remedilesse by any course of law...I know", he says, "among the Saxons the essential parts of a manor were known", but he lays stress on "the Normans, from whom we had the very form of manors."

Mr Seebohm in his ingenious and indeed epoch-making work on the English Village Community has amplified and corrected this view. He states as the result of careful investigations his conviction that the ordinary Saxon estate was held of a lord, with a community, servile in its tenure, cultivating the land under him; that this estate became with very slight changes the Norman manor; that it was neither a Norman invention nor the introduction of Saxon invaders, but that it resulted from a combination of South German and Roman agricultural and economic systems, and was existent in England in its main features before the North German invaders settled there. He further contends that the progress of the tenants on such estates was from almost complete slavery and the duty of rendering unlimited personal services to their lords, through a stage of personal services at first limited, and then commuted for money payments, to practical independence. That these tenants were organised on the agricultural system of open fields and common tillage he agrees, and indeed is the first to satisfactorily explain. He argues that freehold tenants on the lord's demesne did not exist at the time of the Conquest, except in the *socmanni* and *liberi homines* of the Danish and Eastern Counties[1]. It would seem to follow that except in the Danish districts, Common Appendant did not come into existence till after Domesday, and then only as incident to a grant from the lord; and that as to their common rights the villeins also from the first and especially at the first were dependent on their lord's will.

[1] E.g. at Thetford a very Danish town, there are and were very few copyholders. Blomefield, *Norfolk*, II. 47, 59.

The great importance of this view is that it meets a vigorous and, it was thought, successful attack made, from the historical point of view, upon the general theory of the English law, as expounded by Coke and Blackstone, and meets it upon its own ground and with considerable success.

This historical theory of Common rights is based upon the conception of the Mark, or Teutonic Village Community of Freemen, cultivating and owning their land in common. This theory was originated in Germany by Von Maurer, applied to England by Freeman, Kemble and Nasse, and elucidated by the Indian, Sclavonic and Irish investigations of Sir Henry Maine. It finds the beginnings of economic history in the self-governing community of freemen, owning their land in common, and cultivating it by customary rules. It professes to trace the degeneration of this free community through the aggrandisement or ancestral superiority of one of its members, who ultimately becomes its lord, the Mark of Freemen becoming the Manor of Villeins[1]. Though the Bishop of Chester holds that the "Mark System", as a system, never existed in England, and though the township which he treats as the constitutional unit of the English polity, may in his view be either a free community, or a community dependent on a lord, yet he treats even the dependent townships as communities, "which had probably in most instances been originally free, and reduced to dependence by a powerful neighbour", and is of opinion that the internal organisation was the same in the dependent and independent townships[2]. This view of the free institutions before the Conquest would seem to conflict very materially with the legal theory of common rights. For if Mr Kemble's view be approximately correct, these common rights and especially Common Appendant,

[1] Alleged survivals of the free community are seen in such Domesday entries as "*Decem taini tenent Chimedecome. Ipsi tenuerunt T. R. E. pro uno manerio*", (f. 84, b) or in more recent times, "The township of Childer-Thornton, 8 miles N.N.W. from Chester is divided between several freeholders who exercise manorial rights in rotation. The township of West Kirby 18 miles from Chester, belongs to several freeholders who are lords of the manor in rotation." Lysons, 654, 668, cited Morgan, *England under the Normans*, p. 149; which see.

[2] Stubbs, *Hist.* I. 83.

instead of being referred to grants from or sufferance by the lord, are older than the lord, and are survivals of the old free community cultivating its land in common. This view was suggested by Mr Joshua Williams in his Lectures on Commons[1] and also by Mr Kenelm Digby, who states the position thus:— "the common or uncultivated land of the township was in process of time regarded as the sole property of the lord of the manor, and was called the lord's waste, and the old customary rights of the villagers came, as notions of strict legal rights of property were more exactly defined, to be regarded as rights of user on the lord's soil[2]."

It is in answer to this doctrine, which until the publication of Mr Seebohm's book was accepted as giving the orthodox and almost unquestioned historical origin of manors, that Mr Seebohm's views have their importance in the controversy. He maintains that the Saxon conquerors found in England a system of agriculture in form manorial, and simply supplanted the wealthy British land-owners at the head of this system. He admits occasional settlements by tribal households but treats them as exceptional, and he apparently allows a freer element to exist in those Eastern Counties where the Danish settlements were made, but with these exceptions he repudiates the existence of independent village communities in England; and, going further, he attacks the evidence on which Von Maurer had asserted their existence in Germany by endeavouring to show that it is at least equally consistent with a manorial constitution.

It has been, I think, rather too hastily assumed that the legal and historical theories are in conflict. If what I have called the legal view be confined to the period following the grant or regrant of almost all the land of England by William the Conqueror, while the so-called historical view is limited to the period preceding such grant, I see no reason why the two should not consistently be held by the same writer, especially if the historical theory be adopted with the corrections and limitations rendered essential by Mr Seebohm's work. For the whole

[1] Williams on *Rights of Commons*, pp. 47, 57, et seq., et post, pp. 31, 38.

[2] Digby, *R. P.* 3rd ed. p. 155.

strength of the historical view is derived from the survivals in later English legal and economic history of incidents which it is suggested can only be explained by the truth of such a historical view.

Thus the text-writers and cases from Domesday onward clearly show that there exists an organisation of some kind, the *villa* or town, neither conterminous nor identical in constitution with the manor. It is true that, if we are to believe Domesday, England was at that time covered with *maneria*, in many cases apparently identical with *vills*; but when we remember that in Domesday the conception of tenure is so rudimentary that we find no mention of *socagium*, *liberum tenementum*, or *villenagium*, but only of *socmanni*, *liberi homines*, and *villani*, we may well doubt whether the *manerium* in Domesday involves any very definite idea of tenure, and whether it is not rather used in its looser sense of a settlement or even a house. We find 20 acres of land in one place, 12 held by a *liber homo* in another, described as *maneria*: "*In Aldebure tenuit Vlueric sochemannus Edrici T. R. E.* 80 *acres pro manerio*[1]." In 1268, prisoners were tried at York, because "*noctanter venerunt ad manerium ipsius W. de Magna Celdona, et muros ejusdem manerii fregerunt, et bona et catalla ipsius W. et hominum suorum ceperunt*[2]."

However this may be the dissimilarity of the manor and vill, and the importance attached to the vill are obvious. In Glanvil the term *manerium* only occurs in one sentence[3], as to the division of manors among children on the death of their parent, when the "*capitale manerium cum capitale messuagio*" is to go to the heir. But wherever Glanvil gives the form of a writ, the land is to be demanded in some *villa*: ...e.g..."Rex vicecomiti salutem.—Praecipio tibi quod juste facias amensurari pasturam de illa *villa*, unde I. quaerit quod H. eam injuste superonerat, nec permittas quod H. in ea pastura plura averia habeat quam habere debeat, et quam habere pertinet, secundum quantitatem feodi quod ipse habeat in eadem *villa*[4]." And that the *villa* is a place and not a jurisdiction or system of

[1] Morgan, *England under the Normans*, 70.

[2] *Abbreviatio Placitorum*, p. 167; see also below, p. 12.

[3] Gl. VI. 17.

[4] Gl. XII. 13.

tenure seems clear from two other passages[1]:—"Summone 12 liberos et legales homines de vicineto de illa *villa*"; and the direction as to a woman complaining of rape, who "mox dum recens fuerit maleficium vicinam *villam* adire debet." Bracton however leaves no doubt upon the point. After copying Azo[2] that "ex jure gentium agris sunt termini positi, aedificia sunt collata et vicinata, ex qua collatione fuerit civitates", he adds "burgi et villae[3]." In explaining a gift he says: "Item per hoc quod dicit *in tali villa* vult quod certus locus comprehendatur in quo res sita est quae datur[4]": and later on he expressly distinguishes *villa* and *manerium*[5]: "Videndum igitur quid mansio, quid *villa*, quid *manerium*. Mansio autem esse poterit constructa ex pluribus domibus vel una, quae erit habitatio una et sola sine vicino, etiam etsi alia mansio fuerit vicinata, [non][6] erit villa, quia villa est ex pluribus mansionibus vicinata, et collata[7] ex pluribus vicinis. *Manerium* autem fieri poterit ex pluribus villis vel una, plures enim villae possunt esse in corpore manerii, sicut et una, et ad unam mansionem pertinere poterunt plura tenementa. Et genera tenementorum pluribus et diversis nominibus specificata, quae cum ad mansionem pertineant, non poterunt dici quod sint in tali villa specificata denominatione mansionis, sed mansio et tenementa simul esse possunt in aliqua[8] villa ex pluribus mansionibus vicinata. Item quandoque est manerium in villa et ubi non fuerit nisi unica villa in manerio, denominari possunt uno nomine, et tenementa tali manerio adjacentia erunt in tali villa et in tali manerio, quia villa denominatur a manerio, et manerium a villa; e contrario"...(and he goes on to consider the case) "Item si plures villae sint in uno manerio." Britton also repeats the distinction:—"Car en une vile porrount estre plusours paroches, et en une paroche plusours maners et hameletz plusours porrount apendre[9] a un maner[10]."

From this it will be seen that the vill and manor were not

[1] Gl. XIII. 4; XIV. 6.

[2] *Summa Juris.* p. 1051. Venice. 1596.

[3] Br. f. 4 b.

[4] Br. f. 35.

[5] Br. f. 434, cf. f. 212. I quote Twiss' text: though, as will be seen the parallel passages of *Fleta* and *Britton* suggest emendations.

[6] *Fleta*, VI. 51, 1, omits "*non*."

[7] *Fleta*, *ibid.* has *villetta*.

[8] *Fleta*, *ibid.* has *alia*.

[9] As to this word, see below, Cap. II.

[10] Brit. II. 19, 4.

only not synonymous, but they were not different aspects of the same thing. One manor might include many vills, or there might be several manors in the same vill. The manor of Taunton Dene covered four hundreds. We read: "Sutton was a very large manor and extended itself into many towns." The manor of Cossey in Norfolk included many villages; while frequently in one vill there were two, three or four manors. This class of facts shows that the simple theory that each village community developed into a manor requires a good deal of modification. Sometimes the term *Manerium* is used as synonymous with Hundred:—"Manerium vel Hundretum de Blackburnshire": while in the early *Status de Blackburnshire*, it is used simply as a settlement, or separate holding: "Vulgaris opinio tenet et asserit quod quot fuerunt villae vel mansae seu maneria hominum, tot fuerunt domini...quorum nullus de alio tenebat, sed omnes in capite de ipso domino Rege[1]."

The term *manerium* seems therefore sometimes used for the whole Honour, Hundred, or holding of the chief lord; sometimes for a single holding, whether or not commensurate with a vill or township, held of the chief lord; sometimes for a collection of such holdings which their lord for convenience had treated as one manor, holding the Courts for all in one of them[2]; sometimes merely a dwelling or mansion-house; as in "Stanmore Abbas Johanne *manerium* construxit"; "*Manerium* de Kyverdale fuit integraliter combustum[3]."

In the *vill* we have the township, which the Bishop of Chester treats as the unit of the Anglo-Saxon polity, and which had in itself public duties in criminal administration apart from any relation to a lord. The goods of fugitives were to be delivered "a la *ville* pour nous en respondre[4]." If a prisoner escape from the "garde de aucun *ville*, se soit la *ville* en nostre merci[5]." The *ville* gave its verdict[6], and many more instances could be cited.

The Manor and the Vill being established as different insti-

[1] Whitaker's *History of Whalley*, I. pp. 53, 72, 229.

[2] Cf. the Manors of Colne, Ightenhill, Accrington, etc. in Whalley, Whitaker, I. 229.

[3] Spelman, *sub voce*, see above, p. 10.

[4] Brit. I. p. 11 (Nichols' ed.), see also I. 35.

[5] *Ibid.* I. 44.

[6] *Ibid.* I. 181.

tutions it is suggested that we should if possible ascertain which of them is of earlier date, for if the vill or township can be shown to exist prior to the manor, if the township or village community is older than the lord, it is said that we have a historical account of the origin of common rights which at any rate adds an important supplement to the legal theory if it does not actually contradict it[1].

By what process can the township or independent village community, if it existed, have grown into the manor, or come into the hands of the lord of the manor. One obvious answer is by a grant of the land on which it was settled, made by William the Conqueror to one of the barons who had assisted him in his Conquest, and by the confirmation by that baron of the settlers on the land in their ancient position, subject to payments or the rendering of the services to himself. This or a similar process is suggested by Bracton; who says, speaking of the King's demesnes:—"Fuerunt etiam in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, et cum per potentiores ejecti essent, post modum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendi inde opera servilia, sed certa et nominata[2]." The difficulty in accepting this view as applying to all manors is that Mr Seebohm has conclusively shown communities tilling common fields and rendering services and labour in kind "as they were bid", at least 150 years before the Norman Conquest, and developing by stages which can be traced into the manors of Edward I. In the manor of Tidenham in Gloucestershire, a comparison of its services in A.D. 956, and in A.D. 1305, shows a distinct progress from slavery through customary and commuted servile duties to freedom[3]. It is indeed admitted by the Bishop of Chester that some vills or communities seem to have been dependent on lords from very early periods, though he suggests that they were at a still earlier date independent. And there are several isolated facts and rules which are difficult to explain on the hypothesis of the universal prevalence of dependent communities, which have never been anything but dependent.

[1] E.g., see Williams on *Rights of Common*, p. 47, criticised *post*, pp. 31, 38.

[2] Br. f. 7 b.

[3] Seebohm, *V. C.* pp. 148—159.

Traces of an earlier system Mr Seebohm's theory hardly accounts for are to be found in many entries in Domesday. In Suffolk it is recorded: "*In hundred de Colenes est quaedam pastura communis omnibus hominibus de hundret*[1]." The *homines villae*, or *homines qui villam tenebant* appear as the proprietors of lands. In Bedfordshire:—"Hanc terram tenuerunt *homines villae* communiter et vendere potuerunt[2]", and in the same county, "In Meldone Johannes de Roches occupavit injuste XXV acras super *homines qui villam tenebant*, ut homines de hundreda attestantur[3]." They also constantly occur in the *Abbreviatio Placitorum*;—"communia pasturae de Askham, quae *homines Askham* clamant[4]." And this conception of the village community lingered long. In 1488 John Myller by his will gave to "the men being and inhabiting in Holm his marsh on the west side of the said town to the use and profit of the said community for ever[5]"; and in 1495 Thomas Zarley, clerk, left his lands to the use of the village on the condition that the community of the village should see to his funeral[6].

There are also a number of instances, particularly in the counties under Danish influences, where we seem to see communities of freemen who have just lost their independence, sometimes indeed at a halfway stage in that process. Of entries as to individuals we have such as these:—"Non fuit de feudo sed tantum fuit homo suus";..."Homo effectus est antecessoris, sed terram suam sibi non dedit;...Milites habebant sub se quatuor ita liberi ut ipsi erant[7]." In Norfolk at Dersingham we read "In eadem villa tenent 21 liberi homines 2 carucatas terrae et 35 acras, 5 bordarii, 3 carucas, 7 acras prati...habet suus antecessor" (the predecessor of the then lord of the manor) "commendationem tantum, et horum 18, si vellent recedere, daret quisque duos solidos: Stigand de omnibus socam[8]." Here

[1] f. 339.
[2] f. 213, b.
[3] f. 214.
[4] p. 2.
[5] Blomefield, *Norfolk*, x. 331.
[6] Blomefield, VIII. 400: cf. the townlands of parishes; see Blomf. v. 12; VI. 442; VIII. 507.
[7] Cited in Digby, *R. P.* p. 37 from Kelham.
[8] Blomefield, VIII. 17; D. f. 278 b. Compare Essex Domesday, f. 19 b, Harlow:—"To this manor were added T. R. W. 3 hides which were held by

we may conjecture that the village community of the 21 liberi homines had put itself under the protection of a more powerful man, at first retaining the ownership of its lands, which it afterwards lost. At Horsey in the same county the stage of commendation is a little later in date. "In Horsey 4 liberi homines sub commendatione tantum...unus liber homo tenet 12 acras; ex his non habuit Ailwin suus antecessor etiam commendationem T. R. E. et tamen eos revocat ad suum feudum ex dono regis, quia ille Ailwinus habuit commendationem ex eis T. R. W[1]."

Such entries as the following, in which a large number of *liberi homines* or *socmanni* are described as holding the land T. R. E., without any express statement as to the lord of whom they held it, also have a great likeness to records of independent village communities:—

"Inter has duas villas...25 socmanni...de istis est soca in hundredo[2].

"Wissingset tenet Ranulfus...quas tenuerunt 9 liberi homines tunc[3].

"In Martham, 36 liberi homines, Almari commendati tantum, 5 carucatas terrae et 10 acras tenuerunt.

"In villa Scrotesby 10 liberi homines; de his habuit Almarus Episcopus commendationem T. R. E. et habuerunt 2 carucatas terrae...

"In villa Stokesby, 21 homines 80 acras terrae tenentes jacent semper hinc manerio. Rex et Comes soca de toto...et 3 liberi homines, quos addidit Harduinus T. R. W. et habent 100 acras terrae, et his habuit suus antecessor T. R. E. commendationem."

At Letton, 9 liberi homines, at Shipdam 11, "tenuerunt T. R. E.

"At Rollesby 13 liberi homines et dimidiam sub Gert tenuerunt 55 acras terrae in soca...nunc in firmam Calvestone, sed T. R. E. non pertinuerunt, et ibi sunt additae. (Bl. x. 186).

5 liberi homines, T. R. E., in which have always been six teams in demesne, 8 bordars, 4 serfs."

[1] Blomefield, IX. 314.

[2] Domesday, II. f. 129.

[3] Blomef. x. 81. For all these Norfolk entries, see Domesday and Blomefield, *sub nomine*.

"At Upton, 27 socmanni habent unam carucatam...super hos omnes rex et comes socam et sacam, praeter septem quod habuit commendatos in socam." (Domesday II. 129.)

In a large number of entries in Kent, similar facts appear[1].

There are also many entries in Lincolnshire, a Danish county, and one even yet noted for its relics of common fields, which seem to point directly to common ownership of land by members of a free community. Such is the entry: "William holds four parts of half a hide[2]": others hold such fractional parts as "a fifth part of one hide", "nine parts of one hide", "two parts of one hide." These entries seem explicable by the common ownership of land not definitely and finally divided, but subject to redistribution at certain intervals. And a similar phrase appears in Northamptonshire, where "sex liberi homines tenuerunt T. R. E. Unus eorum vocatur Osgot, *cujus partem terrae* calumniatur Judita Comitissa[3]."

Another difficulty arises from the mode of payment of Hidage, which Mr Seebohm, comparing it with the Roman *tributum* paid by the lord of the *villa*, asserts to have been paid by the lord of the manor for the whole manor, as, if his account of the origin of the manor is correct, would be natural[4]. But there are several instances where the hidage was paid not by the lord but either wholly or in part by the tenants. Thus the record called the "Black Book of Peterborough", compiled *circa* A.D. 1125, contains such entries as these[5]:—"In Burgo sunt 5 hidae et 3 virgae ad geldum regis; et isti homines (villani &c.) adquietant erga regem 5 hidas et unam virgatam[6]...

[1] See entries in Larkins' *Domesday of Kent*, under Essella, Ferlingham, Ferningham, Godeselle, Ham, Hortun, Lolingstun, Orlestone, Pising, Popesell, Romenel, Sifletone, &c.

[2] f. 223 b. Compare the *Hidarii* of Thorpe, Walton and Kirkby, vills in the great manor of Adulvesnasa in Essex, where the services were due from the whole hide, and each hide was owned by a varying number of people. Hale's *Domesday of St Paul's*, Int. xxv. et vide sub, p. 32.—And in the *Custumals of Battle Abbey*, (Camden Society, 1887) in the Manor of Wye, Kent, there are entries of land held by A *et socii ejus*; A *et participes ejus*.

[3] f. 226, b. 2.

[4] *V. C.* p. 293.

[5] Camden Society, *Liber Niger Monasterii S. Petri de Burgo*, No. 47.

[6] p. 161.

In Castre 4½ hidae in dominio, sed villani adquietant...[1] In Pihtesle sunt 5½ hidae ad geldum regis, et dominus adquietat dimidiam, et villani dimidiam...[2] In Esctona isti 12 villani tenent duas hidas, sed abbas adquietat unam hidam cum duobus dimidiis villanis[3]....In eadem villa est terra 12 plenariorum villanorum wasta, quam praepositus ville adquietat de bursa sua, et locat prout melius poterit[4]." A similar series of entries will be found in the *Liber de Consuetudinibus* of the vills held by the Abbey of Bury St Edmunds[5]. While it cannot be said that the payment of hidage by the villeins is conclusive proof of the existence of a Free Community, it is at any rate easier to understand if the villeins had previously formed a free community paying taxes to the King, than if they had always been in the power of a lord.

The Salic law "*De Migrantibus*" is frequently quoted as a conclusive proof of the existence of free village communities[6]. It provides that if any one wants to move from one *villa* to another, he cannot do so without the licence of those "*qui in villa consistunt*," but if he has removed and stayed in another *villa* twelve months, "securus sicut et alii vicini maneat," from which the inference has been drawn that those who "in villa consistunt" and the "alii vicini" were free village communities; Mr Seebohm suggests that the villa was a royal villa. There is however a curious English parallel to this law. According to Glanvil, "si quis nativus quiete per unum annum et unum diem in aliqua villa privilegiata manserit, ita quod in eorum communem gyldam tanquam civis receptus fuerit, eo ipso a villenagio liberabitur[7]"; and in Bracton we read: "ante annum completum nullum habere potest privilegium fugitivus[8]"; and again he speaks of fugitive villeins protected "hujusmodi privilegio, quia manentes in civitate aliqua vel villa privilegiata vel dominico domini regis per unum annum et unum

[1] p. 163.
[2] p. 161.
[3] p. 162.
[4] p. 164.
[5] Made about 1184 A.D. Set out in Introduction to Gage's *Suffolk*, p. XII. Cf. John and his mother hold 30 acres, "non dant hidagium, et sunt de alto socagio." Gage, p. 387.
[6] Lex Salica, § 45, cited Seebohm, *V. C.* pp. 259, 260.
[7] Glanvil, v. 5.
[8] Br. f. 7.

diem sine clamio[1]"; which Britton expands into[2]:—"Villeins ausi porrount recoverer estat de fraunchise par la negligence del seignur, cum si acun soeffre son villein...a demorer en nos demeynes par un an et un jour sauntz chaling qe en acun tens nous fust communement graunté pur nostre profit et pur emendement de nos villes."

It is not quite clear in the Salic Law, which vill must consent, the *villa* which the man has left, or that which he has settled in; in the English version the lord of the vill left must make no claim, and certainly those of the vill in which the emigrant settles must consent to the admission to their gild, spoken of by Glanvil. At any rate in the light of this parallel there seems nothing in the Law *De Migrantibus*, necessarily involving a free community. The English law was constantly acted upon. In 1312 the lord of the manor of Cossey claims 18 villeins who had withdrawn from his manor, and six of them plead with success that they had obtained their freedom by residence for a year and a day in Norwich[3].

The bulk of these facts however are I think only explicable on the assumption of at least some free village communities existing up to the time of the Norman Conquest, at any rate in the Danish and a few adjoining counties. But there is one rule which is difficult to understand on any view of the facts.

A manor cannot exist without a Court Baron; "which is the chief prop and pillar of a manor, which no sooner faileth but the manor falleth to the ground; it is as ancient as manors themselves[4]"..."If one hold of another as of signiory in gross, which is not a manor he hath no court baron[5]", and the Court Baron cannot exist without at least two freeholders; "two free suitors *adminimum*." For "if a manor be, and all the freeholders but one escheat, or if the lord purchase them, it is no manor and there cannot be a Court Baron with one suitor only[6]." But this rule appears to be at least as old as Domesday; at Ordwell, we read, "Hanc terram tenuerunt sex sochemanni

[1] Br. f. 190, b.
[2] Brit. I. xxxii. § 8.
[3] Blomefield, *Norfolk*, II. 409.
[4] Coke, *Complete Copyholder*, p. 57.
[5] Fitzherbert, 3, c.
[6] Kitchin, *Courts Leet and Baron*, (1663), p. 7.

Unus eorum homo regis Edwardi fuit et inwardum invenit vicecomiti. Tres istorum sochemannorum accommodavit Picotus Rogerio Comiti *propter placita sua tenenda*, sed postea occupaverunt eos homines comitis et retinuerunt cum terris suis sine liberatore[1]." A similar instance is referred to in 1294[2]. "Nota ad hoc quod homo potest habere curiam, oportet quod habeat 4 liberos tenentes ad minus, sine mutuacione quarti tenentis"; and the failure of the Court for want of suitors is often referred to: Bracton says, "quia ipse dominus nullam curiam habet[3]" which Britton expands:—"si le seignur ne eyt mie sutiers dunt la enqueste puse estre prisi suffisauntment": and again:—"pur ceo qe le seignur ne ad nule court[4]."

But if the Court Baron is essential to the manor, and free tenants are essential to the Court Baron, there must, one would think, have been free tenants from the origin of manors. Yet in the Domesday Survey of 1086 we find at any rate one great class of free tenants, the *liberi homines* and *socmanni*, only existing in a manor in local and exceptional cases. In the Domesday enumeration these two classes together include 12 per cent. of the population; but only in 10 counties do they exceed 3 per cent. of the population[5]; and those counties in which they are the most prominent are the Eastern Counties and those most subject to Danish influences. Mr Seebohm concludes that:—"the *liberi homines* and *socmanni* were of Danish or of Norman origin, as was probably the Court Baron itself; whilst in those districts of England not so much under Danish or Norman influence, the demesne lands were not let out until a later period to permanent freeholding tenants[6]." The suggested Norman source is introduced on the authority of a passage in

[1] Domesday, f. 193 b.

[2] Y. B. 21 and 22 Edw. I. p. 527. The reason that one cannot be borrowed is that if a false judgment be given by the four and there be an attaint, the fourth would not suffer any punishment.

[3] f. 329 b.

[4] Brit. I. 57; II. 328.

[5] Lincolnshire, 45 per cent.

Suffolk	40	per	cent.
Norfolk	32	,,	,,
Leicester	28	,,	,,
Nottingham	27	,,	,,
Northampton	13	,,	,,
Essex	5	,,	,,
Cambridge, Derby	4	,,	,,
Bedfordshire	3	,,	,,

[6] *V. C.* p. 88.

the *Inquisitio Eliensis*, relating to a district where *socmanni* and *liberi homines* were known to be present, which in its enumeration of classes of men leaves, he thinks, only *Francigenae baronum*, the Norman, or *totius centuriatus* the Danish, origin from which these freemen could spring.

But if this is so we are placed in this position that, though free tenants were essential to a Court Baron, and the Court Baron was essential to a manor, by the common law, which as has been justly observed "generally represents very ancient custom", yet at the time of the Conquest, when all England was covered according to Domesday with *maneria*, this characteristic of free tenants was lacking in all manors, except some of those in counties specially susceptible to Danish influence. For though it is true that in Bracton's time freemen may hold tenements in villeinage, retaining their personal freedom, yet in Mr Seebohm's view the *villanus* with his "servile services" (p. 97) was "a serf", gradually rising to customary freedom, and belonging to a community which had "a servile origin" (p. 178). It is hard to see why Mr Seebohm should suggest that the Court Baron was a Norman introduction, as in his view the materials for it only existed in the Danish counties; and there is no special reason why the Normans should introduce such a Court in manors in those counties, but not in manors elsewhere. And if it is to be attributed to Danish sources, it is at least as plausible an explanation to say that the influence of Danish freedom kept alive the older customs in those counties, which in the rest of England were falling into decay.

From this point of view the class of evidence collected by Mr Gomme in his work on Primitive Folks-Moots is of importance[1]. Setting out in great detail the comparative historical evidence which shows that Courts in free communities and admitted to be of freemen are held in a certain way, he shows by a careful investigation of the records of local courts, that Manorial Courts had similar incidents to these admitted courts of freemen. They were frequently held in the open air with the same forms and proceedings; in each the freemen were the judges, and officers

[1] See also his Article in *Archaeologia*, XLVI. 403, dealing with the common lands of the *Burh*.

were elected to carry out the agricultural regulation of the community. Frequently the Court deals with the lord of the manor in a way hardly consistent with any other origin and traditions than those arising from independence of his lordship. They fine the Lord, and enter the fine in the Court Roll: thus in 1577 at Fulbeck in Lincolnshire, we have in "the estreat of the Court Baron of Mr Thomas Dysneye, Gentleman"...the entry "Thomas Dysnye gent. for trespassing in the several field with his sheep, fined 2d.[1]." At Gainsborough in 1646 also, the suitors "do lay in pain that Sir W. Hickman Bart. (the Lord), shall betwixt this and our Lady Day next make a sufficient fence between Lea fields and the Lordship of Gainsborough, and for not doing the same we do amerce him 30/, and that the said somme shall be by the Burgrave taken out of the estreat of the said Sir W. H. and by him paid to the overseers of the poor[2]."

The position of the Court Baron is emphasised by the different characteristics of the other great manorial Court, the Court Leet. While there is a Court Baron in every manor, there is only a Court Leet in those manors to which the petty criminal jurisdiction which a Court Leet exercises has been granted by the King[3]. The Court Baron is the lord's court; the Court Leet the King's, and as such the higher court[4]. In the Court Baron the suitors are judges; only freeholders can serve, but the Court cannot exist without two of them. In the Court Leet, the steward, representing his lord, is judge; any person happening to be in the district may be called to serve on the jury; and the Court can be held though there are no freeholders in the manor[5]. There are traces too of a time when the Court Baron of the freeholders regarded the presence and

[1] See also at Little Carlton in the same county and at Christeall in 1657. *Athenaeum*, No. 3030.

[2] Slack's *History of Gainsborough:* similar entries occur between 1625 and 1649.

[3] "There is a Court Leet incident to every hundred." Kitchin, *Courts Leet*, p. 45.

[4] Pur ceo qe il ne dut respondre a court de baron, de purprestures presentes a la *lettre*, ky est plus haut court. Y. B. 21 Edw. I. p. 109.

[5] Coke, *Complete Copyholder*, p. 61. Where there are no freeholders there may by custom be a customary court for the copyholders, in which the steward as representing the lord is judge. Kitchin, 81.

claims of the lord as an usurpation. In the 17th century, the Court of Denns, in Kent, which was a species of manorial Court under a Lord, "usually met at 9 o'clock long before the Lord's steward could reach the Court to choose officers to collect the Lord's rents[1]"; this jealousy of the lord's representative being very possibly a survival of their old independence.

Now this Court Baron of the manor, with these distinct characteristics, was the Court that dealt with the property of the freeholders and suitors and with the common rights in the manor. The Court Leet does not as a rule inquire into inclosure of commons, which is not a public nuisance, but a private wrong[2]. It may enquire into encroachments or purprestures on the lord's soil or highways, or into putting diseased horses on the common, for these are public nuisances. It may also by custom make by-laws for the commons[3], though some writers are of opinion that this arises from a confusion of functions, the Court Leet and Court Baron being held together[4]. But usually the Court Baron inquires into encroachments on the common, and into surcharging the common either beyond number or with beasts not commonable. Besides these inquiries it made regulations for the enjoyment of the commons[5]. To this category belong the Byre-Laws of many Yorkshire

[1] Sir R. Twisden's Journal, cited Kemble, I. 485.

[2] Ritson, *Court Leet*, p. 39. Kitchin, p. 45.

[3] Kitchin, p. 89. Ritson, *ibid.*

[4] Ritson, p. 39. From the same source may come the curious incident recorded in the Manor of Pamber in Hants; where the lord of the manor was annually chosen by the Court Leet (Blount-Hazlitt, 238: Gomme, *Prim. Folk.* p. 122). Blount gives no references for this. In the County History (Wilks, Woodward and Lockhart, III., 268), the wooden manorial tallies which Blount refers to are spoken of, and it is said that in 1816 the parties to the Manorial Court were the free franchisers and suitors of the manor, the Dean and Canons of Windsor, the Mayor and Corporation of Basingstoke and others. Who was the lord of the manor is not stated, but all the waifs and strays, and felons' goods which usually belong to the lord, here belonged to the parishioners. In 1253 Emeric de Sacy was Lord of the manor of Barton, with lands at Pamber. Pamber was also a forest over which the Crown had rights. Every freeholder of the manor could cut 2000 turfs, every other inhabitant 1000. It is stated that the Court appointed the manorial hayward and tithingman; and I suspect the tale as to the lord of the manor arose out of this.

[5] Kitchin, 119.

manors, framed by the Courts Baron, confirmed by the lord; and enforced by the Byre-Lawmen, chosen by the freeholders. Thus at Rotherham there were in the town accounts entries of payments to "the Byer-lawmen for casting open closes according to our custom[1]."

These being the nature and the functions of the Court Baron, which is essential to a manor and which cannot exist without free suitors, Mr Seebohm's theory requires that it should not come into existence in many parts of England till after the Conquest, unless among the villeins there can be found free tenants from whom a Court Baron can be constituted. It therefore becomes necessary to inquire into the nature of villenage and the position of *villani*. And this investigation will be more useful because as the class of common afterwards known as Common Appendant only belongs to free tenants, if Mr Seebohm's view is correct, one variety of what is afterwards called Common Appurtenant must be the older of the two, as in many manors Common Appendant must date from after the Conquest.

At the time of Domesday the tenants of lands are divided into:—1. tenants *in capite*. 2. tenants holding of them by military service. 3. *liberi homines*. 4. *socmanni*. 5. *villani*. 6. *bordarii* and *cotarii*. 7. *servi*[2]. Of these, the *liberi homines* and *socmanni* are chiefly found in the Eastern and Danish counties, but what the distinction between them is is not very clear. It has been suggested that *socmanni* were free men whose land was in the soke of a lord and who had commended themselves to him; and that *liberi homines commendati* were free men who were under the commendation of one lord, but had their land in the soke or jurisdiction of another[3]. As to the meaning of *sac* and *soc*, two of the privileges usually attached to the ownership of land by grant, if not, as Kemble thinks, inherent in such ownership, it is impossible to be confident or to say more than

[1] See also a similar Court in the Manor of Somerton, Hazlitt's *Blount*, p. 286, and the Byre-Law of Manor of Extwisell (1561). Whitaker's *Whalley*, II. 227.

[2] There are a number of minor distinctions here immaterial.

[3] Morgan, *England under the Normans*, p. 130.

that the terms imply some amount of jurisdiction over those resident on the land[1]. It has been suggested that the "soke" is always opposed to the "inland", or lord's demesne; in other words that the distinction corresponds to the later division of lands held *in servitio*, or *in dominico*. In later times we know that in many manors there was a distinction between the *insoken* and the *outsoken*, and the two divisions held separate courts[2]. In this case the manor was apparently larger than the *soke;* and the *outsoken* may have resulted from grants of the demesne lands by the lord; the *insoken* being the lands held in customary tillage by services; or the *outsoken* may be those lands belonging to freemen who had commended themselves to the lord, but whose land was outside the manor. On the other hand the *soke* may be larger than the manor: we hear of "a soke containing six manors with a Court Leet and Court Baron[3]." The tenure of a *socman* is equally various. The socmen of the Abbot of Ely before the Conquest were obliged to plough as often as he commanded[4]. In the Honour of Richmond in the large manor of Cossey, three vills were farmed by socmen who accounted yearly; they were only tenants to the lords and had no right in the lands they farmed, but were removed whenever their lords pleased[5]. On the other hand when we read: "In isto hundred habet rex 18 sochemannos tenentes 26 acras et dimidiam, et nunquam reddiderunt consuetudinem praeter servitium regis[6]": or hear of a colony at Oldebi in Leicestershire of 46 socmen with 11 bordarii, we seem to see the village community before us. Some socmen can sell their land, but cannot take it out of the jurisdiction of the lord; some can transfer both their land and personal allegiance to another lord; while some again cannot sell or even leave their land, without the licence of the lord. Every variety of tenure seems to be included under the term *sokeman.*

[1] The Bishop of Chester thinks *socn* means jurisdiction, *sac* litigation: (*Hist.* I., 184). Morgan makes *soc* = jurisdiction, *sac*, the power of punishment (p. 129): and Sir T. Ellis (Int. Dom. I. 273) makes *sac* = jurisdiction, and *soc* the district over which it was exercised.

[2] e.g. Blomefield, *Norfolk*, I. 296, II. 295: Manors of Buckenham, and Soham.

[3] Blomefield, *Norfolk*, VIII. 43.

[4] *Ibid.* VI. 188.

[5] *Ibid.* II. 398.

[6] Domesday, II. f. 4.

Neither is it possible to throw much light on the class of *villani*, in their Domesday sense, as both from manor rolls and from text-writers it is clear that the term underwent considerable changes in meaning. For in the Domesday of St. Paul's we have a record of the condition of the manors of the Canons of St. Paul's in the 12th and 13th centuries[1], and the classes of tenants there spoken of by no means correspond to the tenants in Domesday in 1086. In the 18 manors whose condition is catalogued in the St. Paul's Domesday[2], there are no *villani*, at least not by that name, no *bordarii* and no *servi*[3]. In four out of the five Herts manors *cotarii* appear, but by their holdings some of them have changed considerably since their Domesday brethren were enumerated. In Cadendon, out of the 5 *cotarii*, 3 hold a virgate, 1 a half, and 1 a quarter of a virgate; and work 3 times a week from Michaelmas to August, every week day for the rest of the year. In Kenesworth two hold half virgates, four quarter virgates, and one a "cotland", while three of them hold in addition "old Essart land"; "4 acres of the Essart": "4 acrae de dominico." In Sandon the *cotarii* hold only one acre each but their services and works are easier: while in Erdley, the two or three *cotarii* hold small plots, and their services are more servile.

The first class of tenants in nearly every manor of St Paul's in 1222 is the *tenentes de dominico*, who in one manor appear as "tenentes terras de dominico quae vocantur '*Inlandes*'." They hold all varieties of holdings; in Cadendon, out of 29 *tenentes de dominico* 12 hold half a virgate, 3 a virgate, and 11 a quarter of a virgate; the services are two

[1] The three surveys are in 1181, 1222 and 1240; the chief record being that of 1222.

[2] Edited by Archdeacon Hale for the Camden Society, No. 69, 1858. The manors are situate 10 in Essex; 5 in Hertford; 2 in Middlesex; 1 in Surrey, in which counties, at the Exchequer Domesday, the population was as follows:

socmanni and liberi homines:
Essex, 5 per cent.; Hertford, 1 per cent.; Middlesex and Surrey, none.

villani:
Essex, 25 per cent.; Herts, 47; Middlesex, 50; Surrey, 54.

Bordarii and Cotarii:
Essex, 50 per cent.; Herts, 39; Middlesex, 35; Surrey, 27.

Servi:
Essex, 11 per cent.; Herts, 11; Middlesex, 5; Surrey, 11 per cent.

[3] There are *nativi a principio* in the Manor of Navestock.

ploughings and 3 reapings a year. In Kenesworth "*debent metere semel in autumno ad cibum domini*"; but in most of the other manors, no services but only money rents are stated, and the holdings are much smaller, usually under 7 acres. There is in Cadendon, but in no other manor an entry "*tenentes de dominico per villenagium.*" This tenure Bracton describes thus: "item dicitur *dominicum villenagium*, quod traditur villanis, quod quis tempestive vel intempestive resumere possit pro voluntate sua et revocare[1]": from which we may assume that this class of tenentes occupied a much more precarious position than the *tenentes de dominico.* They are to work two days a week, and about half of them hold half a virgate, the others less. In Tillingham[2] we have two classes, "*tenentes de dominico ecclesiae*", and "*tenentes de dominico antiquitus assiso.*" This entry is said by Archdeacon Hale to refer to land which the canons had let on lease out of their demesnes, and he compares the entry in Ardley[3]:—"De sex praedictis hydis duae fuerunt in dominio et quatuor assisae et adhuc sunt"; though in the full record of Ardley the classes we find are *tenentes de dominico*; and *tenentes ad censum*; while at Tillingham *tenentes ad censum* are contrasted both with *tenentes de dominico* and *tenentes de dominico antiquitus assiso*; the services being all slight compared with the heavy ones to be alluded to below[4].

A second broad class of tenants present in nearly all the manors are the *tenentes operarii* or *ad operationem*; these occur in varying forms in at least 12 of the manors; a large number of them usually hold the same amount of land, their services being much heavier than those of the *tenentes de dominico*, as they work a certain number of days a week for the lord. Thus in Sandon we have three classes:—*tenentes dimidias virgatas ad operationem; operarii decem acrarum; operarii quinque acrarum.* In Ardley:—*Isti sunt ad operationem;* 19

[1] Br. f. 263.

[2] Hale, p. 59.

[3] Hale p. 140, see also Luffenhall, "Isti tenent de hida assisa per Odonem": "Isti tenent de terra assisa" in Sutton.

[4] In Runwell we have tenentes de antiquo dominico, compared with tenentes antiquum tenementum: while in Navestock there is the Nova dominica tradita per Ricardum et alios.

tenants holding half a virgate each, working two days a week except in autumn when it is one day a week, with other services. At Beauchamp the *tenentes terras operarias* hold half a virgate each and owe a number of *operationes*[1] varying with the season. In Tillingham they are called "*facientes magnas operarias*"; they hold a virgate, or 30 acres, working once a week, and are distinguished from a few *operarii*, who hold about 5 acres each. The same contrast is found in Barling, where however the *operarii* hold half a virgate each, and do heavy works; the *minores operarii* hold 4 or 5 acres with varying services. At Runwell the *operarii* hold half a virgate and do two works a week. At Navestock there are a class described as "*Nativi a principio. Isti tenent terras nativas operarias*"; who also hold half a virgate each and do two works a week. At Chingford we have the comparison of *tenentes terras operabiles* who hold 8 acres, with *facientes minutas operaciones*, who hold 5 acres. In Sutton the *operarii* hold 5 acres each, the ordinary holding of a *cotarius* of the Exchequer Domesday; and this fact has led Archdeacon Hale to identify the *tenentes terras operarias* with the *cotarii* and *bordarii* of Domesday[2]. I think this identification cannot be supported. The description of the services and holdings of this class of tenants in most of the manors seems to me to show that the class includes the *tenentes in servitio*, whom Bracton opposes to the tenentes *in dominio*[3]. Further, many of the services set down as performed by the *operarius* are almost identical with those of the Saxon *gebur*, whom Mr Seebohm has shown to be identical with the Domesday *villanus;* and in my opinion this broad class includes those who, though they may be freemen, hold the land in villeinage, or *outland*, by servile tenure[4].

If we set aside the local and often unintelligible classes found here or there, such as *tenentes seracras* in Walton, *tenentes Lodland* in Thorp; or *terrae akermannorum*, there yet

[1] These must be less than a day's work: as in August they are 8 a week.

[2] Hale. Int. pp. xxiii, xxvi.

[3] Br. f. 263.

[4] In two manors, (Walton and Higby), which are very like free village communities, we have *tenentes ad censum et operationem:* each of them at Higby holds a virgate by similar services. In Walton many

remain two great classes of tenants. There are first the numerous tenants of *Essart Land.* This was land reclaimed from the lord's wastes and brought into tillage at various times in pursuance of a grant from the lord or by his indulgence[1]; and it forms a very important item in most manorial rolls, appearing in the North of England, as Rodeland, *terra rodata*[2]. The lord of the manor made grants "*essartas et essartandas*", or reserved to himself the right, as in an early charter of John de Lacy to Adam de Swinden, in which 16 acres are granted "secundum autem quod salvis his acris et vendam et dabo et essartari faciam quantum mihi placuerit[3]." In the manors of St Paul we have in Ardley, Simon, who holds besides other land *ad censum*, "9 acras *de essarto* per 24 pence, quarum 8 habuit pater suus per toleranciam archidiaconi." The records of these manors show the tenants of essart land holding a very prominent place; the "essarts" are denoted by the time when they were made, and we have *tenentes de essarto veteri; tenentes de novo essarto tempore Willielmi; tenentes de novo essarto factum per Archiepiscopum et per decanum et per capitularium; et per finem factum cum decanum et capitularium per unam marcam.* Sometimes the *terra essarta* is also *assisa.* The holdings are generally small and held apparently only by money rents; while both the *tenentes de dominico*, and the *operarii* frequently appear as holding small pieces of essart land in addition to their main holdings.

Lastly we have the important class of *libere tenentes*, whom Archdeacon Hale identifies with the *villani* of Domesday[4].

only hold messuages; but there is the entry:—"terra ista fuit *operaria* usque ad tempore Hugonis, servientis Archiepiscopi qui primo posuit eam *ad denarium*; and at Kirkby, one of the same group of manors, the *tenentes ad denaria* hold various numbers of acres from 70 to 2 for money rents, without any customary services stated.

[1] Mr Williams (p. 231, *Rights of Common*,) appears to confine assarts to forests, and speaks of them as a grievous offence. In forests an assart was punishable; but in ordinary manors it was perfectly recognized and usual.

[2] From *rid* to clear or grub up: e.g. one essart called *Swainey Rode*, or... called Tully *Ridding*. (Whitaker's *Whalley*, II. 287.)

[3] *Whalley*, II. 262.

[4] Introd. p. 26. He identifies *Libere tenentes* with *villani*; *Operarii* with *Bordarii* and *Cotarii*; *Nativi* with *Servi*.

But while almost all of the St Paul's manors in the Domesday record show a large class of *villani*, the *libere tenentes* in 1222 are only present, at any rate under that name, in four manors out of 18; in Cadendon and Sandon in Herts; in Beauchamp and Navestock in Essex. They are entirely absent from the Middlesex and Surrey manors; and when we remember that in the Exchequer Domesday there were no *liberi homines* or *socmanni* in Middlesex or Surrey, and but a small proportion in Essex and Herts, we are tempted rather to identify these *libere tenentes*, with the *socmanni* and *liberi homines* of Domesday. But a comparison of the two records forbids this identification, for in none of the manors of St Paul's in the Exchequer Domesday, which are also contained in the Domesday of 1220 are any *liberi homines* or *socmanni* recorded as present; except that before the Conquest "two *liberi homines* held Navestock as two manors; but since the King came to England St Paul holds one manor and say they have it from the gift of the King, and have seized the other manor and joined it to the other land." On the other hand in almost every one of these manors in the Exchequer Domesday, there is a large class of *villani*[1]. Moreover the services of the *libere tenentes* of 1220, which consist only of *precariae*, or works on a small number of specified days[2], as in Beauchamp:—"Omnes isti libere tenentes metunt et arant ad *precarias* domini et ad cibum ejus sine forisfacto", are widely different from the services of the *villanus* of Domesday, or *gebur* of pre-Conquest records, which always included *week-work*, or contributions of labour on a certain number of days in each week; and this *week-work* is the main feature of the services of the *tenentes terras operarias* in the Domesday of St Paul's. The identification of the *libere tenentes* of 1220, with the *villani* of 1086 cannot therefore be supported. As the theory of their identity with *liberi homines* or *socmanni* is also untenable, we are reduced to the conclusion that they are a class which did not exist at the time of Domesday. But as a result of the Norman Conquest, all the land of England became the King's land, and every holder of land must hold it

[1] In one or two there are only *bordarii*.

[2] Seebohm, *V. C.* pp. 78, 140, 147.

by grant, regrant, or confirmation of tenure by the King. In the same way in the districts which the King granted to his barons and supporters, the holder of land must hold it by grant or regrant from the mesne lord; where he does not he holds it of the King; for at the Gemot of Salisbury in 1086, "ealle tha landsittende men the ahtes waeron ofer eall Engleland waeron thaes mannes men the hi waeron, and ealle hi bugon to him and waeron his menn and him hold athas sworon thaet hi woldon ongean ealle othre men him holde beon[1]." Men who held only of the King though they were in the manor or land of a lord are great rarities and are recorded as such. In Northamptonshire at Erpingham "Ipse Gilebertus tenet in eadem villa 7½ hidas et unam bovatam terrae *de soca regis* de Roteland, et *dicit regem suum advocatum esse*[2]": in Kent:— "in hoc manerio tenet unus homo, nec pertinet ad illum manerium, neque *potuit habere dominum praeter regem*[3]." At Raveningham in Norfolk, "Chetel Friedai, *liber homo regis ad nullam firmam pertinens*, tenet 7 acras[4]." In rare cases the landowner has not made his peace with the King; in Kent we read "Excepto isto dimidio solin tenet W. dimidium jugum in eadem villa, *quod nunquam se quietavit apud regem*[5]." But if this is so, the *libere tenentes* in the manors under consideration can only have come into existence by the grant of the lord to whom the land had first been granted by the King, probably by individual grant to each *libere tenens;* and their rights of common in the wastes of the manor or elsewhere can only in the first instance have resulted from the lord's grant. We are enabled by the Domesday of St Paul's to compare the manor of Beauchamp in Essex in the years 1086; 1181; 1222, thus:

1086.	1181.	1222.
24 villani.	18 *libere tenentes* holding 657 acres.	34 *libere tenentes* with 744 acres.
10 bordarii.	35 *tenentes de dominico* holding 158 acres.	44 *tenentes in dominico* with 180 acres.
5 servi.	8 *tenentes terras operarias* holding 165 acres, (but here the roll breaks off).	16 *operarii* with 240 acres.

[1] *Chron. Sax.* A.D. 1086. *Stubbs, S. C.* p. 82, 3rd ed.

[2] *G. D.* f. 227, b 1.

[3] Larkins, *Kent*, p. 22, l. 9.

[4] Blomf. VIII. 51.

[5] Larkins, p. 23, l. 25.

The growth of 16 *libere tenentes* between 1181 and 1222 can only have resulted from the lord's grant; and this will be true of all manors throughout England in which, at the Conquest, *socmanni* and *liberi homines* were absent. But it is the common rights of these freeholders to which in later law the name "*Common Appendant*" is given; the legal theory presumes these rights to have resulted from the grant of the lord; while one form of the historical theory alleges them to have resulted from the rights of the members of the free village community against each other, before the community and its members became dependent on a lord. For instance Mr Joshua Williams[1], though he admits that in some cases lords of manors have made grants to their tenants, thinks "that in a great number of cases the origin of Common Appendant was not manorial:... in many if not in most cases the origin of Common Appendant is to be traced to the vill, town or township." Mr Digby also considers Common Appendant as the old customary right of the freeholders[2]. But the *libere tenentes*, if their origin is as I have suggested above, have no connexion with the vill, town, or township of before the Conquest, except perhaps in those cases where *socmanni* and *liberi homines* exist in the manors at the date of the Exchequer Domesday; (and these cases are, as we have seen, a small minority of the English manors). Except therefore in the Eastern and Danish counties we are compelled to attribute the origin of freeholders in a manor, and the common rights they enjoy to a period posterior to the Conquest and to the lord's grant. In the case of those manors which at the Conquest show *socmanni* and *liberi homines* existing, I think Mr Williams' view is far more tenable; but in all other manors the relics of the village community must be found, if found at all, in the organization of *villani* and *bordarii*, the descendants of the *geburs* and *cotsetle* of the *Rectitudines Personarum*.

Before however dealing with these classes of tenants and their common rights we may inquire whether there are in the Manors of St Paul's *libere tenentes* under any other names, or whether we are to take it that 140 years after the Exchequer

[1] *Rights of Common*, pp. 38, 39. [2] *Real Property*, p. 155.

Domesday they had only come to be present in 4 manors out of 18. In the first place we find in the great manor of Adulvesnasa, a class of tenants called *Hidarii*, whose services are described as due from the hide and not from the tenant, and who do no *week-work* but only *precariae*, though the *precariae* are much heavier than those of the *liber tenens*. One is strongly tempted to see here in the several vills of Thorpe, Walton, and Kirkby in the manor, each with its *hidarii*, three early free village communities. The Exchequer Domesday however only speaks of the presence of *villani* and *bordarii*, and represents Adulvesnasa as always held by St Paul's as a Manor; and it seems that the *Hidarii* must correspond to the *villani* in those manors in Domesday. It is very possible that the scribes who made up the Exchequer records from the returns of the commissioners disregarded all local peculiarities and threw the returns into a species of schedule-form under general heads, thus destroying the evidence of many customary rules.

The second class whose position it is necessary to consider are the *tenentes de dominico*; and it does not seem possible to identify them as *libere tenentes*, for in all the four manors in which *libere tenentes* appear there are also *tenentes de dominico* as a separate class. Except in Cadendon also their average holdings are small; in Beauchamp 44 hold on an average 4 acres each; and the services, where they are specified are comparatively light, consisting only of *precariae*. In Cadendon the *tenentes de dominico*, who hold more land than in the other manors: "debent arare bis in qualibet seisione, semel sine cibo domini, altera vice ad cibum domini, si dominus voluerit. Debent etiam serclare, metere ter in anno ad cibum domini." But in Beauchamp they apparently only pay money rents.

Bracton's work throws some light on the position of this class of tenants, though both in his pages and those of Glanvil we find *villani* and *villenagium* reappearing. In Glanvil the term *nativus*[1] is used as synonymous with *positus in villenagium*: "Questus est mihi R. quod N. trahit eum ad vilenagium, de sicut ipse est liber homo[2]"... "Pluribus autem modis potest ad libertatem aliquis

[1] *a prima nativitate sua.* Gl. v. 6. [2] Gl. v. 2.

in villenagio positus deduci[1]." The *nativus* had no right to the protection of *legem terrae*, and a *liber homo* who became *positus in villenagio* was in the same position. "Si quis liber homo duxerit nativam in uxorem ad aliquod villenagium, quamdiu fuerit ita obligatus villenagio eo ipso, legem terrae tanquam nativus amittit[2]." On the other hand no freeholder could be compelled to answer in the Lord's Court without the King's command: "Nemo tenetur respondere in curia domini sui de aliquo libero tenemento suo sine praecepto domini regis vel ejus capitalis Justiciarii[3]."

In Bracton's work the first distinction taken is between *liber* and *servus*; and the fact that the free man holds in villenage does not affect his personal status..."Omnis homo est aut liber aut servus...ei qui liber est villenagium vel servitium nihil detrahit libertatis[4]." Men may occupy land *in dominio* or *in servitio* of the lord of whom they hold it. The services by which the land may be held are various. "Item est manerium domini regis et dominicum in manerio, et sic plura genera hominum in manerio, vel quia ab initio, vel quia mutato villenagio...[5]" There are:—

(1) *milites*, holding by free and military service;

(2) *libere tenentes*, holding either by military or peaceful service;

(3) *tenentes in villenagium*: (*a*) *villenagium purum*, quod sic tenetur quod ille qui tenet in villenagio, sive liber sive servus, faciet de villenagio quicquid ei praeceptum fuerit, nec scire debeat sero quid facere debeat in crastino, et semper tenebitur ad incerta...ita tamen quod si liber homo sit, hoc faciat nomine villenagii, et non nomine personae, nec etiam tenebitur ad merchetum de jure, quia hoc non pertinet ad personam liberi sed villani...liber homo si sic tenuerit, contra voluntatem domini villenagium retinere non poterit, nec ipse compelli quod retineat nisi velit;

(*b*) *villenagium non ita purum*; sive concedatur libero homini vel villano ex conventione tenendum per certis servitiis et consuetudinibus nominatis et expressis, quamvis servicia et

[1] Gl. v. 5.
[2] Gl. v. 6.
[3] Gl. XII. 25.
[4] Br. f. 4 b.
[5] Br. f. 209.

consuetudines sunt villanae...(tenants of this class)...recuperare non poterunt ut liberum tenementum;

(c) *socagium villanum; villenagium privilegiatum;* quod tenentur de domino rege a conquestu Angliae. Tenentes de dominicis domini regis tale privilegium habent, quod a gleba amoveri non debent, quamdiu velint et possint facere servitium debitum...villana autem faciunt servitia, sed certa et determinata. Nec compelli poterunt contra voluntatem suam ad tenenda hujusmodi tenementa[1]; et ideo dicuntur liberi. Dare autem non possunt tenementa sua...non magis quam villani puri, et unde si transferri debeant, restituunt ea domino vel ballivo, et ipsi ea tradunt aliis in villenagium tenenda[2]...Tenens in villano socagio...quia tenet nomine alieno, liberum tenementum non habet[3]; and therefore he cannot even if a free man recover it by an action in his own name if he is ejected[4];

(4) *tenentes adventitii*, qui eodem modo tenent per conventionem, sicut et villani sokmanni, sed tales non habent privilegium sicut alii villani socmanni, nisi tantum conventionem[5].

In his first book, Bracton, speaking of the classes of tenants on the demesne of the King, gives descriptions which are not very easy to fit in with the above: he says[6]:—

1. "Sunt enim ibi servi, sive nativi ante conquestum, in conquestu, et post, et tenent villenagia et per villana servitia et incerta, qui usque in hodiernum diem villanas faciunt consuetudines et incertas." These appear to be those tenants *in purum villenagium* of the previous account who were not *liberi homines*.

2. "Fuerunt etiam in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines, et cum per potentiores ejecti essent, postmodum reversi receperunt ea tenementa sua tenenda in villenagio, faciendo inde opera servilia sed certa et nominata...et ideo assisam novae disseisinae non habebunt quia tenementum est villenagium...et ideo dicuntur glebae ascripticii, quia tali

[1] They can hold contra voluntatem domini, which free men holding in mere villenage cannot.

[2] Br. f. 209.

[3] f. 200.

[4] ff. 197 b, 199.

[5] That is, the privilege of fixity of tenure so long as they perform the services. f. 209.

[6] f. 7.

gaudent privilegio quod a gleba amoveri non poterunt, quamdiu solvere possunt debitas pensiones, ad quoscunque pervenerit dominicum domini regis, nec compelli poterent ad tale tenementum tenendum nisi voluerint":

This class again appear to be the *villani sokmanni*, of whose historical origin Bracton here gives an account which suggests that the advocates of free village communities in England may here find traces of them. But his next class is not so easily identified.

3. "Est enim aliud genus hominum in manerio domini regis, et tenent de dominico et per easdem consuetudines et servitia villana, per quae supradicti, et non in villenagio, nec sunt servi nec fuerunt in conquestu ut primi sed per quandam conventionem, quam cum dominis fecerunt, et ita quod quidam eorum cartas habent et quidam non. Et qui si a talibus tenementis ejecti fuerint, seisinam recuperabunt, secundum quosdam, per assisam novae disseisinae[1]." These can hardly be the *tenentes in villenagium sed non purum*, for Bracton expressly says they do not hold in villeinage; though if this be so it is curious that the latter description omits them. Again they may be identical with the *tenentes adventitii*, but if so it is strange that they can have the assize of *novel disseisin*, which only applies to a freehold, for the *villani sokmanni* who have a fixity of tenure which this class of tenants have not, cannot bring such an assize, for they have no freehold. Another suggestion that may be made is that they are *villani* holding by free services: the class spoken of by Bracton when he says:—"Est enim longe aliud tenere libere et aliud tenere per liberum servitium, quia quamvis teneat per liberum servitium, non tamen propter hoc teneat libere, quia tenementum quod conceditur villano tenendum per liberum servitium non facit villanum liberum nisi teneat libere; non magis quam villenagium facit liberum hominem villanum, si liber homo teneat per villanas consuetudines, quia tenementum nihil confert nec detrahit personae, nisi praecedat homagium vel manumissio[2]." On this view again it is difficult to understand how such tenants have, *secundum quosdam*, the novel disseisin.

[1] Br. f. 7 b. [2] f. 24 b.

It seems probable, though the matter is far from clear, that we must find in the class of *tenentes adventitii* the *tenentes de dominico* of the Domesday of St. Paul's, who will hold by agreement, which must be necessarily of a date posterior to the Norman Conquest, and whose rights in the land will depend on the terms of their agreement. What the exact nature of their holding was is a little obscure: "*quidam eorum cartas habent et quidam non*[1]." Fitzherbert in 1523 expects to find the same class in manors, but he calls them definitely:—"*libere tenentes, qui tenent per cartam, et qui non*": following in this the *Extenta Manerii*[2] and *Fleta*[3], where the steward is directed to inquire, "De libere tenentibus, quot sunt, et qui intrinseci vel forinseci...et per quod servicium, an per socagium, serianciam, vel servicium militare, vel alio modo. Et qui tenent de dominicis veteribus vel novis, essartis novis, vel antiquis...et qui tenent per cartam et qui non, et qui per antiquam tenuram et qui per novum feoffamentum."

The position of the *libere tenentes qui tenent per cartam* is clear; not so that of those who do not hold in that manner; it may be that they hold by copy of Court roll, but the first mention of a Court roll in the Year Books, that can be distinctly dated, is in 1369; "le dit J. tient la terre del Prior *per copy de Court roll* a volunte le Prior, pur ce que ce fuit niefe terre[4]." One of the *Articuli Visitationis* given by Archdeacon Hale and dated by him *circa* 1320, contains the following inquiry: "Item an villani sive custumarii vendant, donent, vel locent terras custumarias per cartam vel sine carta, convillanis seu custumariis sine expresso consilio firmariorum et consensu, non in plena curia vel halimoto, *ut per recordum curiae et rotulum* valeret dimissionis modus declarari." But according to Mr. Pike there are in the Public Record Office some Court rolls[5] either of the reign of Edward I. or II.; and it is said that some exist of the reign of Henry III. Bracton however, in the passages where

[1] Br. 7 b.
[2] Hale, *Domesday*, p. 154.
[3] Fleta, f. 160.
[4] 42 Edw. III., Mich. pl. 9, see Mr Pike's Preface to Year Book, 13 and 14 Edw. III. p. xxx.
[5] for the manor of Rickling in Essex.

he speaks of the transfer of the land by means of surrender to the lord or his bailiff, makes no mention of the entry in any Court roll, as a title to the land: and in a case in 1340[1] we find a tenure called *Customers land* "quel est pledable par pleint, et noun par bref entre les tenantz, et quant autre que celui que tient deit aver estat en les terres, il covient que le tenant le rende au seigneur, et il livera a lautre et prendra fyne a sa volonte; et sil fust le franc tenement les tenauntz de nul parte ne serreit il pledable ne fine leve forsquen la Court le Roi quae les tenementz sont frank fee: issi poer saver que le franc tenement demurt seulement en la persone le seignur"; where again no court roll is mentioned, and the freehold is said to be in the lord.

Fitzherbert however in 1523 speaks of the "*libere tenentes qui non tenent per cartam*" as holding "by copy of court roll[2]"; and Coke speaks of the same class thus: "for the freehold at the Common Law resteth not in the Copyholders, but in their lords, unless it be in copyholds of frank tenure, which are most usual in ancient demesne, though sometimes out of ancient demesne we shall meet with the like sort of copyholds, as in Northamptonshire there are tenants which hold by copy of court roll, and have no other evidences, and yet hold not at the will of the lord. These kind of Copyholders have the franke tenure in them, and it is not in their lords[3]."

I doubt whether there is enough evidence to completely untangle this web of early manorial tenure; but even if we assume the *tenentes de dominico* of the St Paul's Domesday to be *libere tenentes* and identify them with the *libere tenentes qui non tenent per cartam* of the *Extenta Manerii*, and with the *tenentes adventitii* of Bracton; if following the *Articuli Visitationis*[4] we treat the *tenentes de dominicis veteribus vel novis, de essartis novis vel antiquis* all as freeholders, there still remains the fact that all these tenures must have originated by individual grants from the lord after the Conquest; for even if we take the *antiqua tenura*, which is opposed to the *novum feoffa-*

[1] Y. B. 13 Edw. III. p. 105.
[2] c. 12.
[3] Coke, *Complete Copyholder*, p. 67.
[4] Ante, p. 36.

mentum[1] to refer to the tenure of pre-Conquest *socmanni* and *liberi homines*, a regrant by, or commendation to the lord is still essential. And therefore if we treat all these classes as possessed of what was afterwards called Common Appendant: yet that Common Appendant still originates from an actual and individual grant in each case from the lord.

And further with regard to the *tenentes in villenagio*, and their customary rights, it is indisputable that after the Conquest the land they tilled was granted to new lords, and if their tenure of it was sanctioned by these lords, the tenure was still "at their lord's will", and by their lord's sanction, and would be not unfairly described as by their lord's grant.

When therefore Mr Digby says[2]: "There can be little doubt that the practice of pasturing by inhabitants has descended from very early times, and was in fact a recognised right in the community before the idea arose that the soil was the property of the lord. To the same origin doubtless must be referred most of the rights of a similar character enjoyed by freeholders and copyholders. These rights did not in fact originate in a grant, they were recognised at a time before the notion of the sole ownership of the lord came into existence"; and when he speaks of the "false historical theory" that such rights must have been created by grant, treating it as a "creation of the Elizabethan lawyers", his language needs careful examination and limitation. For Mr Digby quite accepts the view as to the Conqueror's grants and regrants of all the land of the kingdom, except that held by ecclesiastical bodies[3]: but unless he is prepared to limit this materially all the land in the kingdom then became in the eye of the law the land of a lord, and any previous landowners who continued their holdings could only do so by the lord's grant or permission. We see as a matter of fact all freeholders in manors coming into existence after the Conquest, and by the lord's grant, except in the cases where *socmanni* and *liberi homines* existed. And it does not follow that these two classes remained after the Conquest as *libere tenentes*: there is an entry in the Exchequer Domesday at Benfleet in Essex, "In this

[1] Ante, p. 36.

[2] *R. P.* 3rd ed. p. 150, note.

[3] *R. P.* pp. 33, 34.

manor there was T. R. E. a certain *liber homo* holding half a hide, who now is made one of the villeins[1]." And at any rate it is correct to say that all freeholders in a manor owed their land and rights both in law and in fact to grant or regrant from the lord.

Take next the tenants in villeinage; many at any rate, even before the Conquest, formed part of dependent communities, as Mr Seebohm has shown and the Bishop of Chester has acknowledged; and the only historical evidence of progress we have among this class is of progress from a *villenagium purum* entirely at the will of the lord, to a more secure position. It may be that at some earlier period the community was still independent, and had a customary system of rights of common among its members. But except in the Danish counties such a condition of things can only have existed in the very earliest times, and a long while anterior to the Conquest. The facts still remain that at the Conquest an almost complete change of ownership took place, and that there is no evidence that any particular respect was paid to vested interests or pre-existing rights. It may be that there was a state of things existing which should have given and did give the cultivators a moral claim to the consideration of their lord; but how from the point of view either of law or history their legal rights can be said to originate otherwise than in the express or tacit grant of the lord, it is hard to understand. There is no evidence to support the view that the soil was not treated as the lord's property; in the 13th century at any rate the freehold of the soil held by tenants in villeinage was treated as being in the lord. Britton defines villeinage in 1292, as "tenement de demeynes de chescun seigneur, baillé a tenir a sa volunte par villeins services de enprouwer al oes le seigneur, et liveré par verge, et nient par title de escrit, ne par succession de heritage[2]." And we find the lord in different parts of the country claiming the ownership of the commons and wastes against all strangers. Thus in 1275 at Eccles in Norfolk, William le Parker, lord of the

[1] II. f. 1 b.

[2] Brit. III. 2, 12.

lordship of Hapsburgh has these liberties belonging to his manor; liberty of *resting-geld* of the beasts of any strangers resting one night in the commons of the said village in shack-time[1]; and common pasture of all cattle; while none of the villagers have any right of common here or any in the said village, except they hold their tenements of the manor, and unless they hire it yearly of the said William[2]. In Lancashire in 1311 there was a like payment called "*Thistle take*", exacted by lords of manors for the depasturing of drove beasts upon their commons, even if they only stayed to crop a thistle[3]; and a similar payment of one half-penny a beast existed under the same name at Halton in Cheshire[4].

As will be argued hereafter[5] it is probable that even before the Statute of Merton, the lord could deal as he liked with the commons and wastes of his manor so long as he did not derogate from his own grant[6]; and there seems no reason to suppose that the soil was not considered his from a very early period, probably from the first moment the question of the soil became of importance. It is true that *Gateward's Case*[7] in 1607 is the leading case in which a custom for the inhabitants of a vill to have common in another vill was held bad; and the Court there said that copyholders or customary tenants might allege a customary common, since as they held at their lord's will, they could not prescribe, or claim by implied grant, in their own name or in the name of their lord, for the lord could not claim common against himself in his own name. But the position of the Court here is only that taken for example, by William le Parker, lord of the lordship of Hapsburgh, more than 300 years before, when he claims that no inhabitant of Eccles has common as such, but only as his tenant, or as hiring the common of him[8].

[1] tempore aperto.

[2] Blomefield, *Norfolk*, IX. 294.

[3] Whitaker, *Whalley*, I. 306.

[4] Hazlitt's *Blount*, p. 143.

[5] sub. p. 61, et seq.

[6] How otherwise can the large numbers of assarts in the 12th century be explained?

[7] 6 Rep. 59 b.

[8] Blomefield, *Norfolk*, IX. 93. If it is said that this shows that in 1275 there were inhabitants of Eccles, who did not hold of the manor, it may be remarked (1) Eccles in Norfolk was in a Danish county; (2) the inhabitants may have been forensic tenants of other manors; (3) anyhow the lord refuses to recognise any right of common in them.

The distinction between the various kinds of common is not, as we shall see[1], elaborated till the 15th and 16th centuries; and the legal amplification of the ways in which common can be claimed is perhaps "a creation of the Elizabethan lawyers"; but I see no reason to doubt that the lord was treated as, directly or indirectly, the owner of all the soil in the manor from very soon after the Conquest.

Fuller investigation therefore confirms the view expressed at the outset that the legal view of the origin of commons is quite compatible with the historical position. All legal rights of common originate in the lord's grant or in his permission or sufferance, and this is the essence of the legal view. Before that grant there is, at any rate in some parts of England, a system of customary rights of common among members of a free community independent of a lord; it may even be that in many of the later manors there had been at a more or less remote period, this condition of things; and this is the historical view. But the historical fact that freemen had rights of common, independent of any lord, before the Conquest cannot affect the legal position of manorial rights after the Conquest or to-day; nor can the legal theories of Norman lawyers or of to-day detract from whatever truth lies in the early history of the Free Village Community.

Note. In the *Custumals of Battle Abbey* (1887), just edited by Mr Scargill Bird for the Camden Society (No. 41, N. S.), a mass of interesting manorial records are made accessible. They relate to manors in Sussex, Kent, Surrey, Essex, Oxon, Hants and Wilts, during the 13th and 14th centuries. They show *libere tenentes* distinguished from *tenentes custumarii* who include a class variously called *villani*, *virgarii* or *yherdlinges* (cf. yardlands), and various species of *cottarii*. The "works" of the *tenentes custumarii*, especially their *week-work*, are much lighter than on the St Paul's manors in the previous century; and on some of them the day-work can be commuted into a fixed increase in rent.

[1] sub. Chapter II.

CHAPTER II.

Commons Appendant and Appurtenant.

The distinction in modern times between Common Appendant and Common Appurtenant is as follows. Common Appendant is the right which every freehold tenant of a manor possesses to depasture his commonable cattle, levant and couchant on his freehold tenement anciently arable, on the wastes[1] of the manor[2]. It only applies to commonable cattle, horses, oxen, cows, and sheep. It is said by some to be of common right, that is in accordance with, and a rule of, the common law[3]; but by others it is alleged and presumed to arise from a separate grant to each freeholder of such a right[4]. Lord Coke's explanation of its origin is this[5]:—"The beginning of common appendant by the ancient law was in such manner; when a lord enfeoffed another of arable land to hold of him in socage; *per servicium socae*; as every such tenure at the beginning was that the feoffee *ad manutenendum servicium socae* should have common in the lord's wastes for his necessary cattle which plowed and manured his land, and that for two reasons: (1) because it was, as was then held, *tacite* implied in the feoffment" (because the land could not be ploughed or cultivated without cattle and they could not be kept without pasture). (2) "The second reason for the maintenance and advance of tillage;...so that such common appendant is of common right...and commences by operation

[1] Originally on all pasture in the manor, common fields, etc.

[2] Williams, *Rights of Common*, p. 31.

[3] Williams, p. 36.

[4] *Earl Dunraven* v. *Llewellyn*, 15 Q. B. 791, discussed by Mr Williams, *ibid.* p. 36; and Appendix C. to Real Property.

[5] *Tyrringham's Case* (1584) 4 Rep. 36 a; at f. 37 a.

of law...and therefore it is not necessary to prescribe therein." Common appurtenant on the other hand is against common right, becoming appurtenant to land either by long user or by grant express or implied. Thus it covers a right to common with animals that are not commonable, such as pigs, donkeys, goats and geese; or a right to common claimed for land not anciently arable, such as pasture, or land reclaimed from the waste within the time of legal memory, or for land that is not freehold, but copyhold[1].

If we trace this distinction backward from the time of Coke, we find Fitzherbert in 1523 distinguishing thus[2]:

"Common Appendant is where a lord of old time hath granted to a man a meseplace and certain lands, meadowe and pastures, with their appurtenances to hold of him. To this meseplace lands and meadow belongeth common"..."Common appurtenant is where a man hath had common to a certain number of beasts or without number belonging to his meseplace, in the lord's waste. This common appertains by prescription, by cause of the use time out of mind."

The distinction here appears to be simply between common by grant, and common by long user; but the definitions appear in 1462 in their modern form, and more definitely than in Fitzherbert[3]. Littleton, J. says, "Si le defendant alien le dit meason, et ii boves de terre, le common passera ove ce, per consequens appendant." Prisot, J. adds "Il est a voir comment le common sera dit common appendant, et ove queux bestes il usera commune appendant, et aver commune al sa terre arable et a ses beastes que gain sa terre et compester, sicut chivales, boeufs pur gainer son terre, vaches et berbits pur compester sa terre, et cest common il ne usera ove goates ou geese et hujusmodi, car ceux bestes ne sont compris deins le usage de ce common et ce common est ameasurable selon le qualite et quantity del frank tenement a que il est appendant." Choke, J., continues by suggesting a claim of "Common appendant, ove toutes maneres des bestes, scilicet porces, gettes, et hujusmodi auxi bien come

[1] Williams, *Common*, p. 168.

[2] *Duty of a Surveyor*, c. 10.

[3] 37 Hen. VI. Trin. 20: Broke, *Common*, 13: Broke's abstract is more definite than the original Yearbook: see also Broke, 12; 9 Ed. IV. 3 (1474).

chevaux, et per consequens nient appendant; mes il poet estre dit appurtenant." Broke sharpens this into "Mes lou homme claime common pur toutes maneres de beastes, il poit mistier porcels, goates et hujusmodi et hoc est common appurtenant et nemy appendant[1]."

If we now look to the early text-writers we shall be perplexed to find that the distinction apparently does not, for them, exist. The only word used to describe the connexion of rights of common with land in Glanvil, Bracton and Fleta, is *pertinere, pertinentia*; and though as Coke says, the word may conceal the distinction and must be "construed *subjectâ materiâ*, the circumstances of the case directing the Court to judge the common to be appendant or appurtenant[2]"; on the other hand it may be that one word was used because there was no distinction to be made.

In Glanvil the phrase is:

"nec permittas quod H. in ea pastura plura averia habeat quam habere debet...et habere *pertinet* secundum quantitatem feodi, quod ipse habet in eadem villa[3]."

"Communis pastura in ea villa, *quae pertinet ad liberum tenementum* suum in eadem villa[4]." These all appear to refer to what would now be called common appendant, though it may be that another writ, claiming "aisiamenta sua in pastura de villa illa quae habere debet, *et habere solet*[5]", refers to a claim other than common appendant, and prescription.

In studying Bracton we have the advantage of having side by side both the Latin abridgment called *Fleta* and the Norman French epitome called *Britton*: the result is rather curious.

Bracton, after dealing with *res corporales*, begins to consider *ea quae sunt de pertinentiis liberi tenementi*[6]. These servitudes according to him originate:—(1) de voluntate et constitutione dominorum [vel][7] propter servitium certum vel propter vicinita-

[1] Here though common appendant is defined in the modern way, common appurtenant is only applied to the one variety appearing in the case: for beasts other than commonable.

[2] *Tyrringham's case*, 4 Rep. f. 38.

[3] Gl. XII. 13.

[4] Gl. XIII. 37.

[5] Gl. XII. 14.

[6] Br. Bk. IV. c. 37: cf. Fleta IV. 18: *De Pertinentiis.* Britton, II. 23, *De Apurtenaunces.*

[7] Britton, Fleta, and some MSS. of Bracton, omit *vel.*

tem...Ita *pertinet* servitutes alicujus fundo ex constitutione sive ex impositione de voluntate dominorum. (2):—Item *pertinere* poterunt sine constitutione per longum usum continuum et pacificum et non interruptum...ex patienta inter praesentes quae trahitur ad consensum[1]. Britton reads "Qi que unque purchase le soil, cel purchase les *apurteynaunces* dues a cette soil,...dount acunes sount ordinez et establies par ceux qui poent le soil enserver; et acunes per long usage des uns, et par suffraunce et negligence des autres." As to this it may be said that so far the distinction is between express grant and long user implying a grant; and that the writers clearly treat the whole soil as the lord's and all servitudes as subtracted from his rights.

Bracton in his next chapter, on *Communia Pasturae*[2], stating that common must be in the soil of another, and not in one's own soil, (which still treats the lord as the owner of the common), says that common of pasture can be acquired in the following ways:—

(1) *Ex causa donationis*:—si quis dederit terram *cum pertinentiis*, et cum communia pasturae. (Britton reads "acun soil ovek *common apurteynaunte*")[3].

(2) *Ex causa emptionis et venditionis*, si quis communiam emerit in fundo alieno, ut *pertineat* (Britton: *soit apurteynaunte*), ad tenementum suum, licet sit de feodo alieno et diversa baronia, [et][4] ex constitutione dominorum fundorum.

(3) Item acquiritur *ex causa* [dominorum fundorum][5], sicut per servitium certum.

(4) Item *ex causa vicinitatis*.

(5) Item ex longo usu sine constitutione cum pacifica possessione continua et non interrupta...ex scientia [negligentia][6] et patientia dominorum.

Bracton says "Et eisdem rationibus *pertinere* poterit communia ad liberum tenementum", to which *Fleta* adds the important remark "dum tamen a tempore in brevi mortis

[1] This is the same distinction as Fitzherbert's (ante, p. 43), without any distinguishing names.

[2] Br. f. 222 b.

[3] Brit. II. 24, 3.

[4] *Fleta* (f. 254) reads *tamen* for *et*, and *suorum* for *fundorum*, which makes sense.

[5] Fleta and some Bracton MSS. omit these words.

[6] Britton, Fleta and some Bracton MSS. omit this.

antecessoris ante comprehensum et infra." The "time in the writ *Mort D'ancester*", was in the time of Bracton "the last return of King John our father from Ireland into England[1]", which was altered in the time of Edward I. to the coronation of Henry III. It is not quite clear what Fleta's remark means, unless that where no grant was shown common must be proved to have been enjoyed during the time of legal memory. Or in view of later law it is also susceptible of the explanation that there can be no Common Appendant which has begun within legal memory; though it is very doubtful whether the author of Fleta meant this.

Bracton, having enumerated the modes in which common could be acquired, deals next with the kinds of common:—"Item per tempora, ut si omni tempore, vel certis temporibus et certis horis...Item per loca, aut si ubique et per totam", (as to which he refers to implied exceptions:—"excipiuntur tamen quaedam tacite et quandoque expressa, sicut rationabilia defensa." Britton adds: "Car en tems de renable defens ne deit nul communer pur nul purchaz de commune, sicum en sesouns des prez et des blez").

Bracton continues, after an exclusion of common *in dominico alicujus* quae claudi possunt et excoli:—"Item ad certa genera averiorum vel si ad omnimodo averia et sine numero, vel cum coarctatione et cum numero, vel ad certum genus averiorum." (This includes the subject matter of one distinction between common appendant and common appurtenant, but with nothing to show that that distinction was fixed.) He goes on, and the corresponding passage of Britton is important[2]:—"Non debet dici communia, quod quis habuerit in alieno, sive per precio, sive causa emptionis, cum tenementum non habeat ad quod possit communia *pertinere*": and Britton translates "nul tenement a qui celle commune porra *apendre*." Here in the first place Bracton refuses the title of common to what seems to be in later language a "common in gross", and secondly Britton translates *pertinere* by *apendre* in a case where the opposition is between a servitude attached to land (praedial), and a servitude attached

[1] Br. f. 253 b.

[2] Br. f. 222 b; Brit. II. 24, 4.

to a person, without any reference to the kind of servitude. Anticipating, it may be said that Britton appears to use *apendre*[1], when a verb is required in his sentence, *apurteynaunte*, when he wants an adjective, to express *pertinere* and its derivatives, without any other distinction between them. Thus where Bracton says one ground may be subject to several servitudes, "ratione diversorum tenementorum ad quae *pertinent*[2]", Britton translates "a queus les servages *appendent*[3]." On Bracton's writ for disseisin of pasture he says that the plaintiff "oportet rationem docere, qua *pertinet* communia ad liberum tenementum suum, ut si dicat quod communia *pertinet* ad liberum tenementum suum quia feoffatus fuit de tali tenemento cum communia pasturae ad tot averia[4]"; Britton translates *pertinere* by *est apurteynaunte*, though it may well include a case of common appendant in the modern sense.

I have only found a few passages in which Britton uses the two words in the same sentence[5]. The plaintiff is to state "a quel tenement il cleyme la commune *appendre*"; for he may have no freehold "a quei la commune porra *appendre*"; and then, (that is, when he states his title), "il porra dire que la commune est *appurteynante*[6] a son fraunc tenement en tellè ville, par la resoun que il de tel tenement fust feffé en quel tens icele commune fust *appurtenaunte* a son fraunc tenement." Here though it is possible to contend that common appendant time out of mind is distinguished from common appurtenant, I think the more natural construction is that no distinction is made between the two words. In other passages the term *appurteynaunte* is certainly used where we should expect to find *appendant*. Thus to the writ claiming "commune de pasture *appurteynaunte* a son franc tenement en telle ville[7]", the author suggests as answers "le pleyntif ne ad terre ne tenement a qui celle commune fust unques obligé

[1] Of varying uses of this verb we have in one paragraph, (Brit. II. 27, 3)..."remedie *apent*;.....a li *apent* de mettre beastes:...auntant de commune cum a ly *apent*."

[2] Br. f. 223 b.

[3] Brit. II. 25, 1.

[4] Br. f. 224, b.

[5] Brit. II. 25, 5.

[6] One MS. reads, "porra apendre e est appurteynaunte."

[7] Brit. II. 26, 4.

ne *appurteynaunte...*" or:—"nulle commune est *appurtenaunte* car mesme cel tenement a quel il cleyme commune *apendre* soleit estre foreste...et commune a tous ceux del visne." Here this would be correct according to modern views in the sense that no common would be appendant to such land, it not being anciently arable, but incorrect because common might by prescription become appurtenant to such land. Britton rarely uses the word *appendant*; e.g. in a passage "s'il furent de acun tenement feffez a quel la commune est *appendante*[1]"; with which we may compare: "la commune est *apurteynaunte* a son fraunc tenement en telle ville, par la resoun que il de tel tenement fust feffé[2]."

So far as Britton is concerned there seems to be no distinction in meaning between *appendre, appendaunt* and *apurteynaunte;* and judging from Bracton, Britton and Fleta, there is no distinction then recognised in the law to which the words might apply. All rights of common must belong to some tenement, for Bracton refuses to call "common in gross" a right of common at all[3]: they may so belong by agreement or usage or service, or neighbourhood[4], and each class may be a right of common at various times, in various places, to various extents. Though the amount of common which pertains to a free tenement is spoken of in general terms, there is no recognition of any special class, called, or the same as, Common Appendant.

The early Year-Books do not seem to support the modern distinction. In 1293[5] a case in which a right of search on a common pasture was claimed by B. "par la resone que nus tenum une carue de terre en N. a la quelle une cerche en celle commune...est *appendante*"...and by Adam because..."la cerche est apurtenant a nostre manere de C.," contains a pedigree of the land, in which it is said "nus volum averer ke le cerche est *apendant* a nostre franc tenement en N. par la resoun ke un tel,

[1] Brit. II. 28, 5.
[2] *ibid.* II. 25, 5.
[3] vide ante, p. 46.
[4] Bracton, f. 225 b; Brit. II. 26, 3, "par title et par usage, et par vicinage." Comparing this with Fitzherbert and the modern distinction, it reads
appendant...par title
appurtenant...par usage
par vicinage...par vicinage
in gross...(not called common)
[5] Rolls Series. Y. B. 21 Edw. I. p. 18.

ke fut tenant celle terre, fut seysi de la cerche cum *apurtenant*, e de ceo enfeoffa un G. od les *appurtenances;* G. enfeffa B., ke ore tent...B. seysi cum *appendant.*" This might suggest either that common appendant was derived from grant, appurtenant from user; or that there was no distinction then existing. That the latter is the truth seems probable from a case a few pages later, in which we read[1]:

"J. tynt une carue de terre en N. a la quelle terre cette commune de pasture fut *apendant*, memes cely J. enfeffa B. de celle terre od le pasture ke est *appurtenant*":...and again:—"chekun commune de pasture ou il est *apendant* a franc tenement, ou par especialté...si je fusse disseysi de commune de pasture, jeo ne porroy jammes aver recoverie par la novele disseysine si elle ne fut *apurtenant*, ou si jeo ne use especialté, e desicom yl ne put dire ke ceo est *appendant*, ne yl nad nul especialté..." Here there seems no distinction whatever between the words.

In 1294 a reporter's note distinguishes the various kinds of common, thus[2]: "fet a saver ke il y ad commune de pasture *appurtenant* a franc tenement, e commun a certain nombre de bestes nent *apurtenant*, e commune a nent a certain numbre ensemant nent *apurtenant*..." which seems merely to be a distinction between a praedial and a personal right, the common in gross being divided according as it is with or without stint[3].

In 1303[4], a grant of "manerium cum pertinentiis et communam pasturae in M." is said to pass "common cum *apendaunt* par cele parole cum pertinenciis; et la commune *comme un gros* par la clause subsequente": but the common spoken of here as '*apendaunt*' is called a few lines lower down '*appurtenant*[5].' In another case it is admitted that by common law a freehold to which common is *appendant* has only common for the beasts of the owner manuring his land[6]. In 1304 we have the phrase:—"sa commune pasture solum ceo que aver deit ou a lui *apent* a aver solum le franc tenement quil tent en mesme la ville[7]"; but

[1] Y. B. 21 Edw I. p. 28.

[2] 22 Edw. I. 365.

[3] See also a case (p. 509) where the same right of housebote is spoken of indifferently as *appendant* or *appurtenant* to land.

[4] 31 Edw. I. pp. 326.

[5] See also *ibid.* pp. 346, 413.

[6] *Ibid.* p. 425.

[7] 32 Edw. I. p. 45, cf. also pp. 190, 226—240.

it is opposed to *commune cum un gros*, as in the earlier cases. In the reports about this time it seems generally to be assumed that if the commoner cannot show an *especialté* or special grant or title, he must show "fraunc tenement en la ville a quey commune est *appendant*[1]." Thus we have the question:—"Coment clamez vous commune? Com *apendant*, ou par especialté[2]": while Hengham, J. says, "prescription de tens, est assez bon especialté[3]."

A little later (1305) it is noteworthy that while one defendant claims common appendant to his freehold, another claims common "with all manner of beasts by reason of long enjoyment of the right by himself and his ancestors and the tenants of a freehold in R."; and this is described at the beginning of the case as "fraunc tenement a quei la commune est *apendant*[4]." In 1307 another case affords means for comparing the two terms[5]. The Lord of the vill had seized cattle in the common pasture for services due from a tenement in the vill, claiming that he might so make distress in the "commune *appendaunt* a soil dount sa rent ist"; and the Reporter adds a note that this claim was worthless, "cum toftis non sit communis pastura appendens[6]; fuit tamen communis opinio et curiae et narratoris quod licet tofti fuerat terra &c. cui communis pastura fuerat *pertinens*, non in eodem communi extra terram potuit advocare." Here *pertinens* and *appendens* seem to be used in the same sense. In the same year a freeholder in one vill claims a common in another vill, *tanquam appendens* to his freehold, and the Reporter adds a note that in such a case the claimant "non cepit titulum ulterius quam breve novae disseisinae limitatur, quia dixit communam esse *appendentem terrae*, et sic de ea posset uti brevi novae disseisinae, quod nisi fecerit, oporteret titulum capere de tempore a quo non exstat memoria[7]."

[1] 32 Edw. I. p. 321.

[2] *Ibid.* p. 464, cf. the same distinction, Broke, *Common*, 5; 45 E. III. 25, (1372).

[3] p. 430. I think *apendant* refers to grants: *especialté* to claims in gross, or claims by prescription.

[4] 33 Edw. I. p. 372.

[5] 33—35 Edw. I. p. 495.

[6] Mr Horwood translates "was not so appendant"; i.e. I suppose that it could be distrained on.

[7] *Ibid.* p. 507. The claimant of a right appendant to land by grant need only show seisin since 1220; claiming by custom a longer proof would be necessary. Finl. *Reeves*, I. 299, note. The distinction here again seems to be between a praedial and a personal right.

The cases of the years 1302—1307 as compared with those of the years 1292—4 show, I think, that the term "common appendant" was becoming appropriated to common claimed as held with a freehold in the vill; though in some cases even that is called "appurtenant", and though the term "appurtenant" is never contrasted with "common appendant", in them.

In 1332[1], it is definitely stated as a defence that "la terre a que le plaintiff claim la commun destre appendant fuit de wast, et derreinment approve, a quel commun ne puit estre appendant." But the Assize found "que ce fuit ancient terre a que common fuit appendant de tout temps." This follows out the passage in Bracton that common cannot *pertinere* to a place in which in its waste condition every one has had common. In the same year[2], turbary was claimed as *appendant* to land which was found to be an assart granted "cum pertinentiis", and Counsel for the claimant urged: "si vous a moy grantes un place de terre ou tant de common come *appurtenant* a une bove de terre en certlieu, la passe le commun comme *appendant*, car celui que ad la terre aura le commun"; but the opposite counsel denies this, and his denial is upheld by the Court. Though one ground of this decision may be that in either case the common did not arise by prescription and the grant of the appurtenances passed no common at all, yet there seems here to be a recognition of common appendant, as the name for the common belonging to land anciently arable.

A little later in 1337[3] William claims common of pasture in land, meadow wood moor and pasture in the vill of F. "*appurtenant* a son franc tenement quil ad en la ville de C." for all manner of beasts. The Assize find that in the wood moor and pasture, W. was seised of common of pasture "comme *appendant* a son franc tenement et lui et ses auncetres avount estre seisis de temps." In another case[4] a claim of common *appendant* to land was met by an allegation that in the time of Henry III. the land and the common were in one hand, and that the common had therefore been merged[5]; an attempt is also made to

[1] 5 *Liber Assisarum*, pl. 2.
[2] pl. 9.
[3] 11 Edw. III. p. 30.
[4] *Ibid.* p. 70.
[5] A similar allegation in 1351, 24 Ed. III. pp. 25, 45. Broke, *Common*, 10, "Comment que soit common appendant."

claim common as *appendant* to messuages, to which the objection is made that "par lei commune ne poet estre *appendant* al mies, quare amesurement ne poet estre fait"; but the other side claim the common as *appendant* to the messuage from time immemorial, and the issue is received whether they were so seised. Here it would seem that the modern sense of common appendant as only belonging to arable land has not been reached. Later the case is put[1]:—"si homme clayme commune de pasture com *appendant par prescripcion de temps.*" In the same year, 1337, common appendant to a freehold is described as of beasts levant and couchant on the freehold[2]. In 1338, estovers are claimed as *appendant* to a freehold, which is inaccurate in the modern use of the term[3]. A number of freeholders claim pasture, which seems in no way to differ from common appendant, as "*appurtenant a lour frank tenements*[4]." A prior and others say they have "terre en une ville a quei commune est *appendant*"; and their cattle have pastured in a field called Southfield "qui chescun terce an gist warrect, a quel temps touz les communers deivent communer par tut l'an, et ount commune de tut temps cum *appurtenant*[5];" where the two words seem synonymous. In 1339 again, common in one vill (A.) is claimed "comme *appendant* al franc tenement que nous tenoms en la ville de B., de temps dount memorie nest[6]": a use of the term *appendant* which is certainly contrary to Coke's explanation of it; for the "encouragement of tillage" hardly demands that one vill should have pasture in the lands of another. The result of these cases in 1337—8, does not show the distinction if any between the two kinds of common at all advanced in clearness, but if anything more obscure.

In 1339, the prioress of N. claimed common of pasture "comme une grosse de temps dont memorie nest." The Assize found that the Prioress and her predecessors had not used the common with their beasts couchant and levant at all times in a

[1] Y. B. 11 Edw. III. p. 195.

[2] *Ibid.* pp. 289, 593.

[3] *Ibid.* p. 495, see also Broke, *Common*, 6, in 1348.

[4] *Ibid.* p. 561.

[5] *Ibid.* p. 562; obviously a common field lying fallow the third year in rotation.

[6] 12 & 13 Edw. III. p. 208.

certain place, but with their beasts couchant and levant in all parts of their farms; and the Court said that if the former alternative had been found, "la common sera agarde per force de Ley *appendant* a cel place, et nient un grosse." Here again the distinction seems to be made between rights of common belonging to particular land, and rights belonging to particular persons[1]. In the same year[2], in the course of a long discussion as to the rights of a commoner to take in other beasts, the only distinction suggested is between "common appendant ou per speciality"; "common appendant ou gros"; though Broke in 1576, abstracting the case, simply uses the distinction "common *appendant* ou *appurtenant*[3]."

In 1352[4] on a claim to common "quae pertinet ad liberum tenementum suum" in 3 acres of moor with all manner of beasts in all seasons of the year; counsel said that pigs, goats and geese were not beasts of common, and that this common was claimed as *appendant*, which could not be understood of such manner of beasts; but the plea was not allowed. Broke suggests that "all manner of beasts" meant "all manner of commonable beasts", but again it may be that the distinction was not then recognised. Anticipating for a moment, in 1428 Babbington, J. laid down that if there was a grant "pro averiis suis in D.", "uncore il ne poet communer mes tantum ove avers comminable", and Broke shows that the dictum was not long established law by adding "*Quod nota*[5]." In 1367 in a claim of "common *appendant* a 20 acres en mesme la ville...et il et touz ceux que estat il ad ount eue comen en mesme le lieu de temps dount memorie nest": counsel say: "mes al entent de ley, home n'avera mie common *appendant*, s'il ne soit appendant du temps du prescription[6]." With this it is curious to compare a case in 1426: "que homme ne besoign de prescriber en common *appendant*, mes suffist a dire que il est seisie del trois acres in D. et que il ad common *appendant* la, per que il myst ses avers[7]."

[1] Broke, *Common*, 23; 22 *Lib. Ass.* 36.
[2] 22 *Lib. Ass.* pl. 84.
[3] Broke, *Common*, 40.
[4] 25 *Lib. Ass.* 8.
[5] 9 H. VI., p. 36; Broke, *Grant*, 5.
[6] 40 E. III. p. 10.
[7] 4 H. VI. 13; Broke, *Common*, 11; see also in 1444, 22 H. VI. 10, "cestui qui justify pur common appendant ne besoign de prescriber in ceo auxi."

The result is that though the matter of Common Appendant in its modern definition, appears to be taking form in the early part of the 14th century, there is no clear case of distinction between commons appendant and appurtenant before 1462; and even then the difference is not clearly grasped, for in 1472 we find Littleton, J., saying[1]: "chescun common per cause de vicinage est common appendant"; to which Broke adds "nemo contradixit neque affirmavit." There are many traces of an early distinction between common belonging to land, to which the name "common appendant" is given, and common belonging to a person, held by some special title or grant[2], in which *specialité* prescription is sometimes included. Common appendant is always spoken of as belonging to *liberum tenementum*, and *libere tenentes*; and therefore would not be a right of the villeins or *tenentes in villenagio*, who were not *libere tenentes* though they might be freemen. If so, the historical pedigree of the *libere tenentes* in a manor becomes of interest in fixing the antiquity of this common appendant to land; and as we have seen that the *libere tenentes* in most manors in England came into existence after the Conquest, and, in the remaining manors, pass through at the Conquest a change of title and lordship, it becomes clear that common appendant cannot be treated as Mr Williams[3] treats it, as a relic of the village community. It seems also that the view of the court in *Earl Dunraven* v. *Llewellyn*[4] that common appendant resulted from a grant to each individual freeholder is, when we consider Bracton's language and the origin of *libere tenentes*, more correct historically in all probability than Mr Williams' view that common appendant was of common right, and independent of the lord's grant.

It remains to consider why the distinction between Common

[1] 7 E. IV. 26: Broke, *Common*, 29.

[2] Thus in 1304: 32 Edw. I. p. 320; it is laid down *in Banco*, that when in a replevin for beasts taken, the defendant says the beasts were in his severalty, it is sufficient for the plaintiff to aver that he had a right of common there, "saunz moustrer nul especialte; ou quil ad fraunc tenement en la ville a quey commune &c...." although the defendant says that the plaintiff "nad fraunc tenement en la ville a quey commun apend, ne reset ou ces bestes pessauns la commune purrunt cocher et lever."

[3] *Rights of Common*, p. 37.

[4] 15 Q. B. 791.

Appendant and Common Appurtenant should become marked at the time it did; and I think a reason can be suggested. Before the year 1285 there were in the manor freeholders holding land *cum pertinentiis*, which included a right of common varying according to the terms of the grant, but usually for a number of cattle proportionate to the amount of land and engaged in its culture[1]. There were also holders in villeinage, at the will of the lord, with certain customary rights of common which could be dealt with only in the lord's court. But in 1285 the Statute *Quia Emptores* created a change: no new freehold tenants could be so enfeoffed as to hold their lands as tenants of the manor; but all grants of freehold land by the lord would establish the grantee as a freeholder independent of the manor. This at once provides in the freehold tenants of the manor a class of tenants, which cannot be increased, and which has special rights of common. It would not be till some time after the Statute *Quia Emptores* that the class would become a marked one, by the creation of freeholders independent of the manor, and the improvement in the position of the tenants in villeinage. But when the class had become well recognised, it was natural that a special name should be given to the right of common most usually enjoyed by its members, and even that such a right should be presumed to exist in each member of the class unless he proved a greater right. What determined the particular names given it is impossible to say; but, Common Appendant being appropriated to this particular class, Common Appurtenant comes to include all other rights of common by virtue of the ownership of land, over the manorial commons, whether arising from express grant or from custom. *Common in gross* is the personal servitude, as opposed to the two common rights attached to land; and common *pur cause de vicinage* is merely an excuse, when excuse was needed, for trespassing or straying in the great wastes in which the townships or hamlets were scattered.

[1] Thus c. 46 of the Statute of Westminster the Second (1285), implies that a freeholder debet habere communiam pasturae quantam pertinet ad liberum tenementum suum, *de jure communi*, but contrasts this with *speciale feoffamentum*, see *sub.* p. 61.

CHAPTER III.

Approvement and the Statute of Merton.

The Statute of Merton in 1236 gave a parliamentary sanction to the enclosure of wastes by a lord of the manor: but before we consider its terms it may be well to restate the position of the commoners and their lands.

There were in a manor rights of common of pasture:—

(1) Over that portion of the common arable land which was lying fallow in its rotation, and over the arable land which was being tilled that year, *tempore aperto*, as soon as the harvest was over. This is what Fitzherbert in 1523 describes as "on the plain champaign countrie; where their cattle lie daily before the herdsmen; and it lieth nigh adjoining to their common fields[1]."

(2) Sometimes, says Fitzherbert, "there is many towns wherein their closes and pastures lie in severaltie; there is commonly a common close taken in out of the common fields by tenants of the same towne, in the which close every man is stinted and set to a certaintie how many beasts he shall have in the same[2]."

(3) There was common in the wastes and woods of the manor: "in the lord's outwoods that lie common to his tenants as common moors or heaths which was never arable land...In these commons", says Fitzherbert, "the lord should not be stinted because the whole common is his own."

[1] *Book of Surveying*, c. 9.

[2] cf. the Town Close at Norwich v. sub. p. 89; which has recently been before the Chancery Division.

The second class of rights of common existed over land already enclosed, but enclosed that it might be kept in common, and their position is not of importance here.

The first class, rights over land in the common fields, could only be altered or destroyed by the agreement of all the tenants. It is true that the lord's land might lie in the common fields and that he might enclose it at his will[1], but it is not probable that much of his land was so situate. We have several records of early agreements of tenants to change the course of cultivation and by so doing to temporarily or permanently extinguish rights of common. Thus in 1261[2], the prior of Cattele complains that he is disseised of his common pasture in Billingay, "quae pertinet ad liberum tenementum suum in eadem villa." The jury say that that land "solebat seminari quolibet altero anno" and that the prior "quolibet altero anno, scilicet quanto praedicta terra jacuit ad warectum solebat communiare praedictam terram, et similiter tempore aperto[3]. Dicunt etiam quod praedicta terra quandoque de consensu vicinorum solebat seminari quando campus ille jacuit ad warectum, ita quod quater seminata fuit infra hos viginti annos quando campus ille jacuit ad warectum[4]. Et bene dicunt quod omnes vicini communiter praeter praedictum priorem consenserunt quod illa cultura in qua praedicta terra est seminaretur hoc anno per quod ballivus praedicti Johannis (the defendant) seminari fecit in praedicta cultura quatuor seliones. Postea praedictus prior non est prosecutus." Here it seems that universal consent was not necessary; as the one dissentient did not succeed, or at any rate withdrew from the case.

Bracton about the same time lays down that "vicini domini tenementi vel extranei qui non nisi communiam clamare possunt in tenemento", can divide the common by consent: "ut si ita convenerint quod tenementum, quod prius fuit communia inter partes, dividatur pro certis portionibus, et ita quod id quod fuit commune, jam sit omnium pro virilibus portionibus separale,

[1] Fitzherbert, *ubi supra*.

[2] *Abbreviatio Placitorum*, Linc. p. 153.

[3] i.e. after the harvest in the years when it was sown.

[4] Ten years it would lie fallow in these 20 years. In 4 of the 10 it had been sown by consent and the right of pasture waived for that year.

secundum majus et minus, et in quo casu cum semel consenserint, iterum non poterunt dissentire[1]."

In a case in 1338[2], an action for trespass is brought against the prior of T. and others for that their beasts have fed off the plaintiff's corn: they answer that the beasts fed in a field which should be fallow every third year and in a year in which it should lie fallow. To which the plaintiff replies," tiel champ de tut temps par usage de la ville par accord de ceux ount este semez solom ceo quils voillent assenter, alafoithe destre seme par treis aunz, alafoithe par un an; et quils furent assentus touz les tenants de la ville qe avoient terre en le chaump ou nous sumes pleint que le chaump serreit seme, issint vindrent ils et puistrent nos bleez atort com nous sumes pleint." The other side deny the agreement and issue is joined as to its existence.

In another case in the same year of a similar character, the defendants say: "lusage de mesme la ville fut qe la terre en le viles sount severez par devises, issint qe la terre dun partie dounques deit giser friche, et commune en lautre partie, et dioms que vous semastes nostre commune en T. et frechement que nous puisoms nostre commune en la terre qe devereit giser freche." The other side answer "lusage de mesme la ville fut que par assent de la ville quavoient commune illoeques punt de ceo faire *ynnok*[3] chesqun aune; et nous dioms que le defendant ad terre illoeques et par assent de lui et des autres quant pew celle terre, le *ynnok* fuit fait." The other side again deny the assent; and issue is joined; but the reporter adds; "mes prima facie la Court se merveilla d'averer un assent[4]." We may gather that the process of inclosure of common fields by assent was as difficult in early as it appears to have been in later, years.

The inclosure of commons and waste lands not subject to tillage stands on a different footing. If however we leave for the present the question of the lord's rights at common law and before the Statute of Merton to inclose or approve

[1] Br. f. 227: Britton II. 24, 6 adds, "mes a ceo convent le assent de tres touz les communers."

[2] Y. B. Rolls, 11 & 12 Edw. III. p. 562.

[3] Inclosure.

[4] 11 & 12 Edw. III. p. 638.

such land, we may note that the same process of inclosure by assent was in use; the lord usually yielding some privilege to the commoners in return for their consent. Thus to take one of many instances, in 1571[1], the tenants at Fersfield yielded up 50 acres of common to the lord's sole use in consideration of the confirmation of their old customs and the addition of a new one, that they might waste their copyhold houses without license. And at South Lopham in the same county the town surrendered common in a certain meadow that the lord might make a fishery there, on condition that the lord gave them certain lands on the great common. In the same town the lord allowed the town to inclose 60 acres of land from the common and hold it of him, which inclosure in 1736 was let and the rent given to the poor[2]. Sometimes the lords seem to have agreed to inclose and to support each other in inclosing without considering the commoners. Thus we find an early agreement between the Bishop and Prior of Norwich to divide Thorpe Wood and Heath into three parts, two of them for the Bishop; "and if the Prior has a desire to inclose and cultivate the same, the Bishop will assist and support him in so doing[3]." The customs of some manors also allowed inclosures of the waste or common under certain conditions. In many Norfolk manors[4] the tenant may inclose an "outrun" from the common bordering on his house. In other manors there was a custom to inclose with the consent of the lord and homager; in some with the consent of the lord only. In 1413 Thomas, Lord Morle, Lord of the Hundred of Forehoe prosecuted Thomas and John Fouldon for inclosing *without his consent* a small portion of waste in Welbourn[5].

Whether or not prior to the Statute of Merton in 1236 the lord of a manor could inclose ground over which rights of common existed, at any rate that Statute provided a means for such inclosure. It recites:—

[1] Blomefield, *Norfolk*, I. 95.
[2] *Ibid.* I. 234.
[3] *Ibid.* VII. 261.
[4] e.g. Diss, Brisingham, Fersfield, &c.; see Blomefield, I. 14, 63, 92, &c.
[5] Blomefield, II. 375.

"Quia multi magnates Angliae, qui feoffaverint[1] milites et libere tenentes suos[2] de parvis tenementis in magnis maneriis suis[3], questi fuerunt quod commodum suum facere[4] non poterunt de residuo maneriorum suorum, sicut de vastis, boscis, et pasturis, quum ipsi feoffati habeant sufficientem pasturam, quantum pertinet ad tenementa sua", wherefore if it is shown before the justices that such tenants have sufficient pasture and free access to it, the lords shall be protected in their inclosures[5].

The only persons against whom the lord could use this statutory method of approvement were the *milites et libere tenentes*, who had rights of common in the *vasta, bosci et pasturae*, and who had those rights by a grant from the lord himself. But this did not apply where other persons whose right was not derived from the lord claimed common over the same woods, wastes, and pastures. Accordingly and to meet this case it was enacted in The Statute of Westminster the Second in 1285[6]:—

"Cum in statuto edito apud Merton, *concessum*[7] fuerit"; (and then the Statute of Merton is recited); "et pro eo quod nulla fiebat mentio inter vicinum et vicinum, multi domini boscorum, vastorum et pasturarum, hucusque impediti extiterint per contradictionem vicinorum sufficientem pasturam habentium; et quia forinseci tenentes non habent majus jus communicandi in bosco, vasto aut pastura alicujus domini, quam proprii tenentes ipsius domini; statutum est quod Statutum apud Merton provisum inter dominum et tenentes suos locum habeat inter dominos boscorum &c....et vicinos, ita quod domini vastorum &c....salva sufficiente pastura hominibus suis et vicinis, appruare sibi possint de residuo. Et hoc observetur de

[1] The rights of the libere tenentes proceed therefore from feoffment or grant.

[2] The Statute does not refer to copyholders. I think the Lord could approve against them at his pleasure.

[3] Bracton inserts here "et qui impediti sunt per eosdem", and omits "*questi fuerunt quòd.*" f. 227.

[4] The Statute of Westminster the Second uses the word *appruare*, the later *approve*.

[5] 20 Hen. III. c. 4.

[6] 13 Edw. I. c. 46.

[7] On this word which is used also in the Statute of Merton, which runs "*provisum et concessum*", it is argued that the Statute of Merton must have given a new privilege.

his qui clamant pasturam tanquam pertinentem ad tenementa sua. Sed si quis clamat communam pasturae per speciale feoffamentum vel concessionem ad certum numerum averiorum, vel alio modo quam de jure communi habere deberet[1], cum conventio legi deroget, habeat suum recuperare, quale habere deberet per formam concessionis sibi factae." It goes on to provide that the erection of windmills, sheepfolds, dairies, or enlarging of a court necessary or curtilage shall be protected; and that those who throw down hedges &c. or the towns adjoining, shall be punished.

The Statute, it will have been seen, applies to *vicini, forinseci tenentes,* or persons claiming common by a special grant, which must be from the lord[2]. If the lord wishing to approve was lord of the pasture and wood, the only means in which the first two classes could hold was by long user, for the cattle on their tenements. If the waste of the town or the town itself belonged to several lords, the *vicini* might be the other lords, the *forinseci tenentes,* their tenants.

These being the two great Statutes as to the lord's power to approve or inclose, the question has been much debated whether, before the Statute of Merton, the lord had power to inclose against commoners, if he left sufficient common to satisfy their rights; in other words whether the Statute of Merton affirmed or changed the common law. We have in 1265 a semi-authoritative exposition of the Statute from Bracton[3], who says that the constitution of a servitude may be diminished, restricted, increased, or amplified "ut si prius constituatur quod per totum et ubique, restringi poterit quoad certum locum...sed non contra voluntatem contrahentium..." but goes on to add, "Est tamen quaedam constitutio, quae dicitur Constitutio de Merton, per quam etiam invito eo cui servitus debetur, communia coarctatur." This suggests that the Statute was a change in the law, and the rest of the

[1] "In any other way than by the Common Law he ought to have it": not as Mr Digby translates "otherwise which he ought to have of common right." If no particular common were specified there was a presumption that the common was "quantum pertinet ad liberum tenementum suum", *vide ante,* p. 55.

[2] vide Bracton, cited post.

[3] f. 227.

passage, I think, bears this out; for after setting out the writ by which sufficiency of pasture shall be inquired into, he continues[1]: "videndum est qualiter constitutio illa sit intelligenda...videri oportet utrum ille quem restringit constitutio sit liber homo proprius vel alienus[2]. Si autem sit alienus, non ei imponit legem constitutio, tum quia habet servitutem illam forte sicut ex consensu et conventione ubique, quae dissolvi non potest nec per contrariam voluntatem et dissensum, tum quia non feoffatus est per dominum soli, quod coarctari potest ad certum numerum et determinatum secundum quantitatem sui tenementi. Unde in hoc casu si dominus soli et proprietatis sibi velit aliquid appropriare et includere, *hoc facere non poterit*, sine voluntate et licentia praedictorum." So far Bracton has dealt with the difficulties removed by the subsequent Statute of Westminster; his language seems to show that the Statute did not affirm but changed the Common Law, giving the lord power to inclose where before he could not; and the reason given for his previous lack of power is either that the commoner's servitude cannot be diminished without his consent, or that he is not enfeoffed of a right of common according to the quantity of his tenement.

Bracton continues: "Si autem fuerunt libere tenentes proprii[3], tunc refert qualiter fuerunt feoffati, quia non omnes nec in omnibus per constitutionem restringuntur: ideo videndum erit utrum feoffati fuerint large, scilicet per totum et ubique, et in omnibus locis, et ad omnimodo averia, et sine numero, et ita tamen quod hujusmodi communia ad ipso pertineat ratione feoffamenti, et non propter usum, *tales non ligat constitutio memorata*, quia feoffamentum non tollit...Si autem communia fuerit stricta cum numero averiorum certo et determinato...*tales ligat constitutio*...Item eodem modo si ita feoffatus fuerit quis sine expressione numeri vel generis, sed ita cum pastura quantum pertinet ad tantum tenementum in eadem villa, *talem ligat constitutio*"; (because the amount of pasturage can be calculated).

The test appearing to run through the whole is whether the

[1] f. 228.

[2] Holding of the Lord who approves or of another.

[3] Opposed to *alieni* of previous sentence.

Lord will derogate from his grant; now if the grant is supposed to be over all the waste (*per totum et ubique*) and without number (*sine numero*), any inclosure will derogate from it; but if it is only for a certain number of animals on the waste[1], an inclosure may or may not so derogate. From this point of view it is possible that the Lord may before the Statute have had the right to deal with his land, so as not to defeat any previous grant, but the procedure for deciding whether a previous grant was defeated may have been lacking and have been therefore supplied by the Statute of Merton. This is in accordance with one of the contradictory suggestions made by Lord Coke, whose views as to the common law 300 years before he wrote are of course of no great value unless supported by contemporary evidence. In his commentary on the Statute of Merton he says[2]:—"Hereby it appeareth that the Lord could not approve by the order of the common law, *because the common issueth out of the whole waste and of every part thereof*"; and this difficulty may have technically stood in the way of the Lord, as though the common might be only for a certain number of beasts, and the beasts could not be all over the waste at once, yet they had a *prima facie* right to take their common in the part of the waste enclosed, or in every part.

There is also in 1292 an important and nearly contemporaneous statement of counsel, which supports the view that the Statute changed the common law[3]. Isabel brought an assize of Novel Disseisin against Alice, for that after Isabel had "approue par le Estatut" ten acres, Alice had disseised her. Alice answered that her ancestor had granted Isabel a manor, reserving common to himself and his heirs, and that Isabel "ne dut approuer de la pasture nule ren sanz gre ere a ly et ces heyrs"; and because Isabel had made such an approvement without consent Alice disseised her; and the Assize found the facts to be so. On this Lowther, Alice's counsel, asked for judgment; Isle, Isabel's counsel, urged that the fee was in

[1] et id certum est quod certum reddi potest, i.e. quantum pertinet ad liberum tenementum suum, certum reddi potest.

[2] *Inst.* II. 85.

[3] 20 Edw. I. p. 353: same case repeated, 21 Edw. I. p. 62.

Isabel, Alice had only an easement of pasture, and therefore Isabel could approve "par estatut." Lowther replies;—"Vous deysez bien si nus fusums vos tenanz", (when the Statute of Merton would apply) "ou si nous fusoms vostre veysyn" (under the Statute of Westminster), "mais nus avoms plus haut estat, pur ceo ke le maner est tenu de nus par ten service, e la pasture appendant a nostre maner, e ke nul tenant de celle tenure se put approuer sanz nostre gre; e demandoms judgement." Metingham, J. says, "Lestatut ne euere tient tant avant ke vus ke estes tenant vus poez approuer vere le seygneur." To which Isle answers "Le usage[1] ke yl allegge pur ly *fut commune ley devant lestatut de Merton*; par la on checun home pout commuher, e la tenant pout desturber le seygneur de sey approuere; la quelle *commune ley est defete par Merton*, ke ben lyst a seygneur sey approuer vere sun tenant; et par Westminster le II., veysyn contra veysyn." This no doubt is only a statement of counsel, but it is entitled to weight as nearly contemporary with the Statute, and distinct in its terms.

The contention that the Statute of Merton only affirmed the common law rests on two cases. In 1222, 14 years before the Statute of Merton[2], "L'assize venit recognoscere si J. disseisi T. de communia pasture quae pertinet ad liberum tenementum suum in D., et ipse venit et concedit assisam, et juratores dicunt quod idem J. assertavit quandam partem bosci, ubi ipse solet habere communiam suam circiter duas acras, et illas fecit includere, sed alibi potest habere communiam ubique in bosco quantam pertinet ad tenementum suum; post venit T. et retraxit se." Here it seems clear that the jury inquired into sufficiency of pasture left; and that for some reason T. abandoned his case after it was found that he had sufficient. Mr Williams thinks this immaterial[3], but the fact that sufficiency of pasture was considered seems all-important.

With this case we may however compare one in 1292[4] in which a man complained of a dyke made by a Lord in a wood

[1] Apparently referring to the right of Alice to prevent approvement.

[2] 6 Hen. III. Trin. *Common*, 26.

[3] *Common*, p. 105: but see Elton p. 180.

[4] 20 Edw. I. p. 121.

which hindered him from taking housebote and heybote[1] "appurtenant" by grant to his freehold. The Lord's counsel say:—"Le boys si est un grant boys; e Willem (the lord) sy ad leve un fosse, ben dedeynz le boys pur ceo approuer, *cum yl lyt a chef seynur*; issy ke yl y ad assez boys de hors le fosse ou yl put aver housebote e heybote asset par la livere le bayliff Willem. E tut fut cele partye de le boys ke est de ors despendue e destrute, sy porreit yl aver assez a housebote &c.—aylours en meme le boys, e plus pres a son franc tenement de une demye leue de veye; par que il neyt par annusant." The Assize said it was so: "Pur quey nil cepit per breve[2]."

Here a defence of sufficiency of estovers is raised and held good; and this is curious because it is settled modern law that the Statutes of Merton and Westminster do not apply to estovers, but only to pasture[3]; the right which the lord claimed must therefore have been under the common law, for no mention is made of the alternative ground, a custom of the manor to approve against estovers leaving sufficiency[4].

The second case is one of the year 1228[5], in which an Abbot complains of an inclosure made in a wood by the lord who had granted him by charter, "communia ubique in foresta de L." for 60 mares and 8 stallions. The lord admits the grant, but says that the Abbot has sufficient pasture for that number of horses; but because the lord had granted "pasturam ubique", it was adjudged that he could not enclose without the Abbot's consent[6].

We have thus on the one hand these two cases before the Statute, each in favour of the existence of a common law right to approve, and also the numerous assarts already referred to, made from the waste over which the rest of the township had common rights, and only explicable on the existence of some

[1] N. French, *estovers*.

[2] cf. Fitzherbert's *Book of a Surveyor* (1523), c. 10, "But for all arable land, meadows, leys and pasture, the lordes may improve them by *course of the common law*, for the Statute speaketh of nothing but waste grounds."

[3] Williams, p. 197. Coke, *Inst.* II. 86.

[4] Williams, p. 198.

[5] 12 Henry III. Trinity, York.

[6] cf. Bracton, f. 228, ante, p. 62. The Statute of Merton may have changed the common law in this case of a grant for a certain number, but *ubique*.

power of approvement in the lord[1]. On the other hand we have the language of Bracton, and of counsel in 1292; and the language of the Statute of Merton bears out the same view.

Later *dicta* and opinions are in favour of the existence of a common law right. Coke however directly contradicts himself. On the Statute of Merton he says: "Hereby it appeareth that the lord could not approve by order of the common law because the common issued out of the whole waste and every part thereof[2]": but curiously enough goes on, "and yet see Tr. 6 Hen. III." (the case above cited in 1222)[3]. Yet in his comment on the Statute of Westminster the Second, he says: "by the common law the lord might improve against any that had common appendant, but not against a commoner by grant[4]", which is something like Bracton's statement of the law under the Statute.

Mr Joshua Williams thinks that the first passage refers to the lord's own tenants; the second to neighbours and strangers; and that against his own tenants the lord could not approve by the common law, though he could against neighbours and strangers if he left sufficiency of pasture[5]; but if this were so, the Statute of Westminster, which gives the right to approve against strangers on such terms would be unnecessary. Mr Elton holds that Lord Coke could not have meant what he seems to say in the first passage because he would have contradicted himself[6]; which perhaps is setting too high a standard for Lord Coke's consistency. In a case in the Star-Chamber Coke is reported to have said: "the Statute of Merton was only in affirmance of the Common law, for at the common law the lord might approve leaving sufficiency of pasture for his tenants[7]."

The general current of modern judicial decisions is to hold that the common law before the Statute of Merton did allow

[1] See ante, p. 28, and the numerous 12th century assarts in the Domesday of St Paul's.

[2] i.e. *ubique*, as in the Abbot's case in 1228, cited above.

[3] *Inst.* II. 85.

[4] *Inst.* II. 474.

[5] *Commons*, p. 105.

[6] *Law of Commons*, pp. 185, 186.

[7] *Procter* v. *Mallorie*, 1 Ro. Rep. 365 (1617).

the lord to approve leaving sufficiency of pasture for the tenant[1]. Mr Elton thinks that the lord had at common law a right of approvement, Mr Williams that he had it against rights of common derived from user, but not against rights derived from grant[2]; Mr Digby says that the lord had at common law no power of approvement[3].

I am, with great doubt, of the opinion that as, so far as his tenants were concerned, the lord could not deal with his wastes so as to derogate from his grants of common, so therefore in all cases where he had granted pasture for a certain[4] number of animals, he could approve his wastes at common law provided that he left enough pasture to satisfy his previous grants, and that therefore the Statute of Merton was declaratory of the common law; I think that the same principle applied to those who had rights over his land other than by his grant, as by use or neighbourhood; and that the lord could approve against them, unless their rights by usage extended over the whole land, and were incapable of stint. As these two conditions were usually fulfilled I think the lord in practice could rarely approve against neighbours and strangers; and therefore the Statute of Westminster in many cases conferred a new privilege upon the lord, especially if as has been suggested, both Statutes prevented a grant for a certain number of beasts, but expressed to be *ubique*, everywhere in the waste, from hampering the lord in his enclosures. But the cases are so few, and the early *dicta*, which alone are of any value on the historical question, so contradictory, that no solution of the difficulty can be proposed with any certainty.

However this may have been before the Statute of Merton[5], we find after the Statute disputes as to inclosures and common

[1] See *Shakespeare* v. *Peppin*, 6 T. R. 741; *Cooper* v. *Marshall*, 2 Wils. 59; *Glover* v. *Lane*, 3 T. R. 445; *Duberly* v. *Page*, 2 T. R. 391; *Grant* v. *Gunner*, 1 Taunt. 445, *per contra*, *Goe* v. *Cother*, 1 Sid. 106: and see Elton, pp. 177—186; Williams, pp. 105—118.

[2] *Commons*, p. 108.

[3] *R. P.* p. 163, note.

[4] Or a number capable of being made certain.

[5] In 1208, the Prior of Castleacre, sued by trespassing by William de Pynkeney, pleads that the common was not William's property, but that many free tenants commoned there. Blomefield, *Norfolk*, VII. 195.

rights constant on the records. In 1246 at Acton in Lancashire, there is a plaint of novel disseisin of "communia pasturae in Actone, quae pertinet ad liberum tenementum suum in eadem villa...quod ipsi incluserunt et assartaverunt circiter 20 acras ubi semper communicare solebant." The jury find that the defendant is "capitalis dominus villae et quod ipse bene potuit sibi appropriare de vasto suo per provisionem de Mertone", and that the plaintiffs had "pasturam sufficientem ad terras suas[1]."

There is a similar unsuccessful claim by commoners in 1258[2]; nine men were accused of throwing down a fence in Accrington to the damage of the freehold of the Abbot of Kirkstall in Accrington. The fence was erected, said the Abbot, where no one used to common until the defendants threw down the fence. The defendants could say nothing but that they had not thrown down the fence unjustly but with justice, for that the inclosure was their common pasture and had always been so till the Abbot raised the fence. The jury however found that the nine men acted unjustly in throwing down the fence and they were ordered to put it up at their own cost. A like lack of success occurred in 1291 at Lancaster Assizes, where the plaintiff complained that he was disseised of 60 acres of land and 12 of wood, and the defendants replied that the place was one in which they ought to have common pasture. The plaintiff said that he had enclosed one place for a year, the other for five weeks, when the defendants threw down a paling he had made round them; he was the lord of the town, and there was a sufficient pasture for the defendants "ad tenementas suas extra predictas placeas." The jury found that the plaintiff was the lord of the town "et soli predictarum placearum"; that he had enclosed, but that sufficient pasture was left[3].

The commoners were not always unsuccessful. In 1292 at

[1] Whitaker's *Whalley*, II. 473.

[2] *Ibid.* II. 287.

[3] Whitaker's *Whalley*, II. 468. Sometimes those who resisted approvement were commoners by special grant; as where in 1337 a grantee of common "en chesqune parcelle avec un boeuf" and also "communer par an avec 42 boeufs", breaks down closes in the common. Here it must be that the grant "*en chescun parcelle*" prevented approvement: cf. the grant *ubique*, and comments on it ante, pp. 62, 65.

Lancaster, sixteen men and women were charged with trespassing with their cattle on 20 acres of several pasture, "cum hachiis arcubus et sagittis", and with throwing down the fence round the pasture. They said they had common of pasture there which the plaintiff tried to enclose with a fence, which they at once threw down. The plaintiff said they had no rights of common but the jury found that they had, and that they had only destroyed the fence with which the plaintiff had tried to enclose their common, and had not allowed him to approve; and they were acquitted[1]. In 1275 in Norfolk the jury found a lord of the manor to have made encroachments on the common[2]. In the same year a freeman sues William Earl Warren who has appropriated 40 acres of the South Fen "by his power", but the Earl contrives to postpone judgment. Sometimes neighbouring lords attacked each other: in 1301 at Rainham in Norfolk, Thomas de Havile impleads Thomas de Ingaldesthorp and sixty others of Rainham for pulling down a pillory, and they reply that Thomas and one R. de Scales were also lords in the town, of which Thomas de Havile held only a third manor or part, and that Thomas de Havile having erected the pillory on the common ground and not on his proper soil, they pulled it down[3]. Tilney Smeeth in Norfolk was a great common on which seven towns commoned with 30,000 sheep and great cattle, and it was there a tradition of the common people that the inhabitants of the towns had fought with the lords of the manors about its boundaries and had repelled them[4]. In 1245, the Prior of St Faith's, Horsham, had erected a house "in his severals where R. de Brews had common", and on its being complained of the prior declared that for the future he would not take in any of that common, but he does not seem to have pulled down the house[5].

At Clitheroe in 1307 the burgesses were more successful: the Earl of Lincoln granted by deed that the enclosure he had made towards the west of the castle of Clitheroe should be thrown open and remain common for ever: and in his charter

[1] *Whalley*, II. 484.
[2] Blomefield, VII. 103.
[3] *Ibid.* VII. 140.
[4] *Ibid.* IX. 79.
[5] *Ibid.* IX. 245.

to the burgesses he grants them all common pertaining to their burgage lands, except in our wood of Salthull "in quo nullam communam habebunt nec ingressum. Ita tamen quod dictus boscus sepe vel fosseto includatur ita quod averia burgensium in eo ingredi non possint, et si pro defectu clausturae ingrediuntur, sine imparcamento[1] foris mittantur[2]."

The difficulty pointed out in the last clause seems sometimes to have prompted the inclosure of land, lying among common fields, but over which no common rights existed, probably the demesne of the lord. About 1300 Sir W. de Gyney had a park, not enclosed, in the common pasture of Causton, and had driven some cattle of John de Burgh, lord of Causton, that had entered therein, to his manor of Heverland, and it was adjudged on trial that he ought to enclose the park[3]. From some litigation the commoners obtained further protection; in an early suit between the prior of Lewes and the commoners of Upwell Marsh, it was agreed that the prior should have common for his cattle of the manor of West Walton, but not of any other manor, and "that he should be helpful to the commoners to maintain the liberty of common according to the quantity of their lands in Upwell[4]." But sometimes the agreement was for the opposite purpose. In a fine of 1204 Hamo, son of Burt, releases to the Bishop of Norwich his right of commonage in the towns of Elmham and Briseley, as the Bishop did his in the town of Horningtoft; and Hamo had power to inclose the common in Horningtoft paying the Bishop two shillings *per annum*[5].

Besides these disputes as to the right of inclosure, we have also on record numerous difficulties arising from the nature and incidents of the common rights. Sometimes it is whether the corn had been carried away when the commoner put his cattle on to the land; sometimes whether or not certain vills intercommon. The question of the right of the commoners to put cattle other than their own on to the common gives rise to a good deal of litigation. Thus in 1303[6] the lord has searched

[1] Impounding.
[2] *Whalley*, II. 74.
[3] Bl. *Norf.* VIII. 227.
[4] *Ibid.* IX. 132.
[5] *Ibid.* IX. 520.
[6] Y. B. Rolls, 31 Edw. I. p. 424.

the common and found sheep which do not belong to any tenant; the tenant says the sheep belonged to others but were in his keeping, whereupon the judge asks him what necessity he had to take other sheep; the tenant replies that if he had not enough of his own to manure his land he took others, and so they were in effect his sheep. The lord answers: "les terre tenans unkes incommunerent si noun de lour propres bestes... e estres ceo *commune ley est encountre ly*": but Bereford, J., points out: "Il allege especiel ley de tout tens use", (that is, custom). The tenant at length claims by custom because he has a fold in the vill, and the right to gather into it others' sheep, when he has not enough of his own; and this is denied. There is another complicated case in 1337[1]; in which a plaintiff claims common in one vill where he has a franc-tenement, for the beasts levant and couchant in that tenement, but used during the day in tilling freehold land in another vill, and he succeeds. In some manors by custom the tenants claimed the right of agisting the cattle of others for profit, and the surcharging of the commons by these tenants is one of the great features of the history of commons in the 18th century[2].

Contradictory opinions are given whether the lord himself should be subject to Admeasurement in respect of the animals he puts on the common. In 1304[3] we have counsel alleging that the lord of a vill has impliedly agistment without limit as to number; and in 1337[4], another counsel says: "amesurement de pasture ne gist pas que entre tenaunt et tenaunt de ville", without protest from the judge. But in 1304—5 we have some very decided judicial opinions to the contrary. *Hengham, J.* says[5]: "Entendez vous que bref de amesurement ne gist mie entre seigneur e tenant: *Friskeney* (counsel) Sire, noun: ceo nous entendoms pur ley: *Hengham, J.* Vous dites mal": and later the same judge is very emphatic[6]: "Jeo ne serray jamais en altre oppinyone que ceo bref ne servera ausi bien entre seigneur e tenant, cum entre veysin e veysin", and Scrope, a

[1] 11 Edw. III. p. 288, see also 22 Edw. I. p. 544, 30 Edw. I. p. 16.
[2] *vide* sub. Chap. VI.
[3] 32 Edw. I. p. 22.
[4] 11 & 12 Edw. III. 290.
[5] 32 Edw. I. p. 46.
[6] *Ibid.* p. 230.

counsel, replies: "E jeo ne serray jammes en oppinione que homme serra amesure en soil demesne[1]." Again the point is raised by counsel[2]: "Nous soms seigneurs de la comune; jugement si ceste bref gise vers nous, que si nous dusomz estre amesurez, nous perdiroms agistements et approuemens et profits que sount donez par estatut": to which Hengham, J. not unnaturally replies: "Quant vous estes en cas de Statut, eydez vous par Statut[3]. Estre ceo, si vous surcharger la commune, pur quey ne deit lamesurement fere ausi bien vers vous cum vers altres." Fitzherbert in 1523 thinks that the lord should be stinted in the common fields and any enclosed pastures, but not in the lord's outwoods, because "the whole common is his own and his tenants have no certain parcel thereof laid to their holding, but all only by the mouth of their cattle...and it were against reason to abridge a man of his own right[4]."

The Crown lands and Forests over which common rights existed were often inclosed and converted into private parks by a Licentia Imparcandi from the Crown or private lords; other common rights being apparently disregarded. Thus early in the 13th century we have a grant from the Abbot of Bury St Edmunds[5]: "Concessimus licentiam T. de Ickworth militi nostro et heredibus suis ut faciat fossata circa boscum suum in villa de Ickworth et dictum boscum claudere infra bundas nos et ipsum sitas sine contradictionem." In Essex there are many instances of licenses from the Crown "to enclose land in the Forest of Essex to make a park[6]."

In one way or another very considerable enclosures continued to be made; and we have a good means of comparison in two 'Extents' of the Honour and Manor of Skipton in Yorkshire[7], of the years 1311 and 1612 respectively.

[1] On the question whether a man may common in his own soil, see 33 Edw. I. p. 8, *per curiam*: "De commune dreit homme purra communer en son soil demene", and a similar suggestion in 1337, 11 Edw. III. p. 72.

[2] 32 Edw. I. p. 240.

[3] i.e. by the remedy (admeasurement) provided by the Statute (of Merton).

[4] Fitzherbert *On Surveying*, c. 9.

[5] Gage's *Suffolk*, p. 278.

[6] Morant's *Essex*, I. 53, 194.

[7] Whitaker's *Craven*, 301.

"Meadow dispersed in the fields, then (1311) 40*s.*, now (1612) £8.

"Income received for agistment and escape of beasts *tempore claudo et aperto,* then rested at 26*s.* 8*d.*; now yieldeth nothing by reason the grounds are enclosed and kept in severalty."

(The rents of freeholders are reported decayed by reason of the suppression of the monasteries; why, does not appear, or how).

"Grounds improved from the grant of the commons and wastes worth *per annum* 40*s.*

"Of arable land, 287 acres, then at 10*d.*, now being meadow or pasture 7*s.* an acre.

"Grounds improved on the commons since the grant, 20*s.*

"Agistment then 33*s.*, these grounds now being enclosed besides feeding for the deer £14."

But much of these and of other inclosures may have been due to other motives to inclosure which first came into play during the sixteenth century, and to these we now turn.

CHAPTER IV.

Sheep and Deer: Enclosures in the 16th Century.

The causes which led in the 16th century to the inclosures which with the resulting discontent and rebellion play so large a part in the history and literature of the time, have their origin in the great plagues of the middle of the 14th century, the Black Death, in which nearly half the population perished[1]. Prior to that date the progress of agriculture had been in the conversion of waste and wood into arable land. The lord had no difficulty in cultivating his demesne lands, at first by the services due from his customary tenants, and when those services gradually became commuted for money payments, by labourers hired with his customary revenues.

But the great scarcity of labourers caused by the ravages of the Black Death, and the consequent rise in wages, averaging 50 per cent. in all employments[2], made this method of cultivation both difficult and expensive and the lords endeavoured to revert to the old customary services of their tenants, now far more valuable than their money commutation. This attempt to set aside the customary payments led to great discontent, and was one of the chief causes of the Peasant Revolt of 1381. The Statute of Labourers[3], intended to compel the labourers to work at the old rates, also proved unsuccessful, and the lords were compelled to abandon the old lines of agriculture. After a transition in which a system of leases somewhat similar to the

[1] Thorold Rogers, *Hist. of Prices*, I. 295.

[2] Rogers, I. 292.

[3] 25 Edw. III. c. 1.

metayer tenure of the south of France was in vogue, the lord finding stock as well as land and the tenant returning the stock at the expiration of his lease, a new departure was taken. The lords ceased to cultivate the great bulk of their demesne lands, and let them out to small cultivators, at first for short terms and in small plots; afterwards frequently by leases for three lives, or for 21 years. By the middle of the 15th century the bulk of the demesne lands both of lay owners and ecclesiastical corporations were under this system of tenure.

After the Wars of the Roses a new element entered into English agriculture. The spirit of commerce was abroad: Edward IV. had inaugurated its reign; the barons, whose turbulent rule had made the towns preferable for quiet merchants, had killed themselves out in the Wars of the Roses; and their castles were vulnerable before the new invention of Gunpowder. A spirit of trade breathed through England; the merchants of the towns turned their attention to farming, and especially to the growth and export of wool. But sheep could not be reared with advantage either on the open commons, or on the small and scattered plots in which a tenant's or a lord's land then lay, and the desire to carry out sheep-farming as a commercial success led to the consolidation of holdings, the conversion of arable land into pasture, and, wherever it was possible by law or by violence, to the enclosure of commons. With the demand for land and the almost universal rise of prices came a great rise of rents; the small freeholders and those who lived by the plough found it harder and harder to gain a living: the poor men who had relied on the common for the grazing of their one cow, saw it surcharged by the sheep of wealthy graziers, enclosed by rich nobles for their sheep-farms, or converted into a park for their deer. Statutes in abundance were directed against the evil but as Latimer said:—"We have good statutes made for the Commonwealth as touching commoners and inclosures, many meetings and sessions, but in the end of the matter there cometh nothing forth[1]."

The Statutes were evaded and disregarded; and when the

[1] *Sermons*, p. 101.

poor Commons took the law into their own hands, as in Kett's rebellion, the force of the country was directed against those who complained of breaches of the law unredressed, not against the law breakers. The confiscation of the lands of the monasteries in 1536—1540 intensified the evils, for the new lords treated the king's grant as a fresh beginning and departure and endeavoured to disregard the customary and common rights of the tenants they found on the land:—as the popular Ballad said:—

"We have shut away all cloisters,
But still we keep extortioners.
We have taken their land for their abuse,
But we have converted them to a worse use[1]."

The evils of inclosures were first brought to the attention of Parliament early in the reign of Henry VII.[2] when, as Bacon wrote:—

"Enclosures began to be more frequent, whereby arable land, which could not be manured without people and families, was turned into pasture, which was easily rid by a few herdsmen; and tenancies for years, lives, and at will, whereupon much of the yeomanry lived, were turned into demesnes. This bred a decay of people[3]", and, as was said in a petition to the Parliament "sheep and cattle drave out Christian labourers"; or as the husbandman says in Stafford's Dialogue—"it was never merry with poor craftsmen since gentlemen became graziers." In the year 1487 therefore the Parliament passed two acts, one local—the other general. The local act[4] was concerned from the point of view of national defence with the decay of population in the Isle of Wight, which the preamble attributes to the fact that "many towns and villages have been let down and the fields ditched and made pastures for cattle[5]" and also that

[1] Vox Populi, Vox Dei (1549), Ballads from MSS. (Ballad Society, Vol. I.)

[2] Jack Cade in 1450 does not seem to have complained at all of the inclosure of common land (Stubbs, III. 151), though Shakespeare (Henry VI. 2nd part, Act I. Sc. 2) makes a petitioner in the name of his whole township complain that "the Duke of Suffolk encloses the Commons of Melford."

[3] Bacon's *Works*, ed. Spedding, VI. 93, 94.

[4] 4 & 5 Hen. VII. c. 16.

[5] i.e. the common fields have been enclosed.

many farms have been taken into one man's hand. It enacted that no person should have in hands more than one farm. The general act: "An act against the pulling down of towns[1]", sometimes referred to as the Statute of Enclosures, has a preamble which is repeated in several subsequent acts. It is directed against the pulling down of houses and the "laying to pasture lands which customably have been used in tilth", and it provides that all houses let within 3 years past with 20 acres of land for tillage are to be maintained. This act is confirmed and extended by two acts in 1514 and 1515[2]. Both acts complain of the pulling down of towns, and of the "laying to pasture lands which customably have been manured and occupied with tillage." They require the towns decayed to be re-edified within a year, and that any land being on or after the first day of the Parliament commonly used in tillage, which should be enclosed and turned only to pasture whereby any plough or husband house should be decayed, should be restored to tillage within the year, under penalty of temporary forfeiture of half the land till the statute was complied with.

In 1533 an important Act recited that "divers and sundry persons...have studied ways...how they might gather together into a few hands as well great multitude of farms as great plenty of cattle, and in especial sheep, putting such lands as they can get to pasture, and not to tillage", and provided that no person should hold more than 2000 sheep, or than 2 farms[3]. It will be seen that these Statutes in the face of them have but little bearing on the question of common lands, but reference to contemporary writings and pamphlets fills in the details of the picture.

[1] 4 Hen. VII. c. 19. The word "town" is used here and elsewhere in the sense of "village" or "township." There are however a set of acts for the reedifying of "towns" proper; e.g. 26 Hen. VIII. c. 8 for Norwich, c. 9 for Lynn; in each case requiring owners either to enclose their land with walls, or to rebuild. See also 27 Hen. VIII. c. 1, 32 Hen. VIII. cc. 18, 19.

[2] 6 Hen. VIII. c. 5, 7 Hen. VIII. c. 1. See in illustration a petition to Henry VIII., and a draft proclamation in answer; (Ballads from MSS. I. 101), ascribing the evils to the "uncharitable and covetous appetites of gentlemen and merchant adventurers."

[3] 25 Hen. VIII. c. 13.

In 1516, Sir Thomas More had published his *Utopia*, and the first book set out complaints as to the realm of England[1]:—

"Your sheep that were wont to be so meek and tame and so small eaters now have become so great devourers and so wild that they eat up and swallow down the very men themselves. They consume destroy and devour whole fields, houses and cities. For look in what part of the realm doth grow the finest and therefore dearest wool, there noble men and gentlemen yea and certain abbots...much annoying the weal public, leave no ground for tillage, they enclose all into pastures: they throw down houses, they pluck down townes and leave nothing standing, but only the church to be made a sheephouse...Therefore that one covetous and insatiable cormorant and very plague of his native country may compass about and enclose many thousand acres of ground together within one pale or hedge, the husbandmen to be thrust out of their owne, or else either by coveyne and fraud, or by violent oppression they be put beside it, or by wrongs and injuries they be so wearied, that they be compelled to sell all: by hooke or by crooke they must needs depart away." They become vagabonds and thieves, "because they go about and work not, for one shepherd and herdsman is enough to eat up that ground with cattle, to the occupying whereof about husbandry many hands were requisite." As Latimer said later:—"Where there was a great many of householders there is now but a shepherd and his dog[2]." Tyndale in 1528 attacked another evil[3]:—"Let Christian landlords be content with their rent and old customs, not raising the rent or fines, and bringing up new customs to oppress their tenants, neither letting two or three tenantries unto one man. Let them not take in their commons, neither make parks nor pastures of whole parishes; for God gave the earth to men to inhabit, and not unto sheep and wild deer." This latter complaint of the parks for deer we shall find frequently recurring. Polydore Vergil speaking of England

[1] Robinson's translation (1551). Arber's ed., pp. 40—42.

[2] *Sermons*, p. 41.

[3] "The obedience of a Christian Man: On the duty of Landlords." Parker Society, pp. 201, 202.

under Henry VII. says[1]:—"The ground was marvellously fruitful, but in consequence of the abundance of cattle and the numerous graziers, a third part of it was left uncultivated. Everywhere a man might see parks paled and enclosed and full of animals of the chase[2]."

Sir Anthony Fitzherbert in his "*Book of Surveying*" in 1523, has told us how the action of the lords pressed on the poorer classes[3]. "It was", says he, "of old time that all the lands enclosures and pastures lay open and unenclosed. And then was their tenement much better chepe than they be now: for the most part the lords have enclosed a great part of their waste groundes and straitened their tenants of their commons therein; also they have enclosed their demesne lands and meadows and kept them in severalty, so that the tenants have no common with them therein. They have also given license to divers of their tenants to enclose part of their arable land, and to take in new intakes or closes out of the commons, paying to their lords more rent therefore, so that the common pastures waxen less, and the rents of the tenants waxen more." So 40 years after, the Knight in Stafford's *Brief Concept*[4], after urging that the rise of prices compels lords to get greater revenues says:—"And for that we cannot do so of our own lands, that is already in the hands of other men—either by leases or by copy granted before my own time—many of us are enforced either to keep pieces of our own lands when they fall in our own possession, or to purchase some farm of other men's lands, and to store it with sheep or some other cattle to help to make up the decay of our revenues." It is clear from this that much of the enclosure was in assart land[5], reclaimed from the waste, and in demesne lands. Common fields as such were obstacles to enclosure. The *Brief Concept* bears witness to this[6]: the Doctor in that dialogue, discoursing of the remedies for these evils, is made to say, "There is one thing of old time ordained in this realm which being kept unaltered would help hereunto also:

[1] Bk. I. p. 5.
[2] i.e. untilled.
[3] Ed. 1539, c. 9.
[4] Harleian Miscell. IX. 139, 149. Also edition by Early English Text Society.
[5] *vide* ante, p. 28.
[6] p. 185.

that is when men are intercommoners in the common fields, and also have their portions so inter-meddled one with another that though they would they could not enclose any part of the said fields so long as it is so. But of late divers men finding greater profits by grazing than by husbandry, have found the means either to buy their neighbours' parts round about them, or else to exchange with them so many acres in this place, so many in another whereby they might bring all their lands together and so enclose it. For the avoiding whereof I think verily that it was so of old time ordained that every tenant had his land not all in one parcel of every field, but interlaced with his neighbours' land so as here should be 3 acres and then his neighbour should have so many, and over that he other 3 or 4, and so after the like rate be the most part of the copyholds that I do know in this country, which I think good were still so continued for avoiding of the said enclosures."

The tenants were either bought out or frightened out, and the lands thrown together into one great grazing farm, the rights of common over the land being destroyed. Starkie in his Dialogue between Pole and Lupset in 1538[1], represents Lupset as complaining:—"There is no man but he seeth the great enclosing in every part of arable land, and whereas there was corn and fruitful tillage, now nothing is but pastures and plains by the reason whereof many villages are destroyed. The farms of all such pastures now-a-days for the most part are brought to the hands of a few richer men...by this the poor men are excluded from their living." He suggests that the rich who keep so many servants should give each of them a house on their "waste ground, forests, and parks[2]" at a nominal rent, by which means the waste grounds should be well occupied and tilled, especially "if the statute of enclosure should be enforced, and all such pasture put to the use of the plough, as before time had been so used[3]."

But unfortunately the Statutes of Enclosure were not enforced with any rigour. An act of 1536 recites[4] that the Act

[1] Early English Text Society, p. 95.
[2] p. 150.
[3] p. 170.
[4] 27 Hen. VIII. c. 22.

of 4 Henry VII. had been enforced only on the King's lands, "but that the lords immediate and thoder mesne lords have not put the saide act into due execution, the houses yet remaining unedified, and the lands still remaining in pasture"; and it provided that the King was to have half the profits till the re-edification and restoration, each house to have 50, 40 or 30 acres of land with it. But all acts alike were evaded. The act against pulling down farm houses was obeyed by repairing one room for the use of a shepherd, a single furrow was driven across a field to prove that it was under tillage, the cattle owners to escape the statute against sheep held their fields in the name of their sons or servants[1]. At the end of the century the tale is the same[2]. "There was a statute made of late for the maintenance of tillage and reedifying farms decayed. It is to be feared that God has observed how diligent some were to see the poor whipped by a statute made at the same time, and how slack in the execution of that other act of reedifying and plowing, wherefore if Enclosers and Depopulators of towns mean to be saved at the day of judgement, let them willingly cast open their closes again and reedify the farms they have decayed."

Meanwhile the suppression of the monasteries and the confiscation of their lands intensified the evils of the new departure. The demesnes of the abbots, hitherto tilled on an easy customary system, were handed over to new men eager to share in the fortunes resulting on the new road to wealth by sheep. It is true that the Act suppressing the lesser monasteries[3] required the grantees of the monastery lands to use as much of the lands in tillage as the monasteries had used, but this seems in many cases to have been evaded. The lands were granted to rich men and merchants, though Starkie suggested in 1538 that poor men were more suitable grantees of the land than rich men[4]. The "Supplication of the Poore Commons"

[1] Preface to Starkie's *Dialogue*, E. E. Text Society, cix.

[2] Trigge's "Petition of Two Sisters, Church and Commonwealth, for the restoring of their ancient commons, which late inclosure with depopulation uncharitably hath taken away." (1604).

[3] 27 Hen. VIII. c. 28 § 17.

[4] *Dialogue*, I. 59.

in 1546 gives a graphic picture of the proceedings of the new lords[1]: "they make us your poore commons so in doubt of their threatynges that we dare do no other but bring into their courts our copies taken of the Coventes of the late dissolved monasteries—thei make us believe that all our former writings are void and of none effect", and that the grant from the King overrides all the old rights.

For the next ten years the air is full of complaints till they come to a head in the insurrections of 1549. The burden of all is the same: the sheep, the parks, the "greedy caterpillars of the common weale, who add Lordship to Lordship, farm to farm, pasture to pasture. How do the rich men and especially such as be sheepmongers oppress the king's liege people by devouring their common pastures with their sheep so that the poore people are not able to keep a cow for the comfort of them and of their poor family... I know towns so wholly decayed there is not stick or stone standing[2]."

"The towns go down, the land decays;
Of corn fieldes, plaine lays[3];
Great men maketh now-a-days
A sheepcot of the church.
* * * * *
Commons to close and to keep,
Poor folks for bread to cry and weep,
Towns pulled down to pasture sheep,
This is the new guise[4]."

There are bitter complaints of the deer and of the common land enclosed for their use. Thirty years afterwards Harrison writes[5], "in every shire of England there is great plentie of parks...it shall suffice to say that in Kent and Essex only are to the number of 100. A circuit of these enclosures contains oftentimes a walk of four or five miles. Where in time past many large and wealthy occupiers were dwelling within the compass of one park,...there now is almost nothing kept but a sort of wild and savage beasts, cherished for pleasure and delight;

[1] E. E. Text Society, p. 79.

[2] Thomas Becon, *Jewels of Joy*, *circa* 1540.

[3] i.e. meadows.

[4] "Now-a-days." Ballads in MSS. Vol. I.

[5] *Description of England* (1577). Bk. II. c. 19.

and yet some owners, still desirous to enlarge those grounds, do not let daily to take in more, not sparing the very commons whereupon many townships now and then do thrive, affirming that we have already too great store of people in England...the 20th part of the realm is employed upon deer and conies already." Henry Brinklow in 1541 makes the same complaint[1]. "How the corn and grass is destroyed by the deer many times it is pitiful to hear...men joining to the forests and chases have not reaped half that thei have sown, and yet sometime altogether is destroyed. And what land is your parks—the most batel and fruitful ground in England... God grant the king grace to pull up a great part of his own parks and to compel his lords knights and gentlemen to pull up all theirs by the roots, and to let out the ground to the people at such a reasonable price as they may live by their hands..." If they want deer, he says "let them take unprofitable ground and fence it well."

Parliament favoured the deer, and the parks containing them are specially exempted from the statutes against enclosures.—But each park was an occasion of heartburning to the poor of the neighbourhood, who lost their commons.

At Fersfield in Norfolk under Henry VIII.[2], the Duke of Norfolk was aggrieved by the irregular shape of his great park at Kenninghall; a piece of land of the shape of a harp stretched into it very near his palace; and accordingly, treating the matter *au grand seigneur* he enclosed the land to the extent of 44 acres, though the inhabitants of Fersfield had common over it. They petitioned for relief, and his grace's bailiff was ordered to assign them other land. This the bailiff neglected to do, so the inhabitants both went to law, and resorted to force, entering upon their common. The Duke then ordered certain lands to be assigned them instead of the desired acres, and workmen began to level their hedges and throw them into the common; but, while they were working, the Duke was attainted, the manor passed into the king's hands and the workmen were stopped. Then the inhabitants petitioned the commissioners, who took the 44 acres in the park and the

[1] *Complaint of Roderigo Mors*, E. E. Text Society, p. 16.

[2] Blomefield, I. 93.

compensation assigned for them, but gave the inhabitants leave to use an ancient common of 110 acres, which had been enclosed, but broken open by them. The matter was concluded in 1610, when the Earl of Arundel finally confirmed these changes with several minor alterations in common.

Sir W. Forrest appeals to the King to refuse his assent to such enclosures[1]:—

> "See...that one private person in use
> Doth not annoy or harm a multitude of things:
> * * * * *
> Or if ye shall of affabilitie
> Unto some one such libertie grant
> Than...the hynderaunce of mo might warrant—
> * * * * *
> No such thing suffereth a civil ordinance."

But the parks remained a source of discontent in the poor whose commons were enclosed. Some families were specially hateful. Sir John Townley in Whalley added park to park. In 1491 under a *Licentia Imparcandi* from the Crown he enclosed the old park at Townley[2]; in 1497, under a similar licence he imparked at Hapton some old enclosed land; in 1514, by another licence he enclosed the common fields of Hapton[3]. In 1603, we have another trace of his enclosures, the King grants to the Earl of Devon "all that land called Horelaw pasture, formerly enclosed in severalty by John Townley Knight"—which had apparently been forfeited as a purpresture or encroachment. And a tradition lingered long among the common people that a Townley was doomed to wander restlessly to and fro in his park crying "Lay out, Lay out, Horelaw and Hollinghey Clout[4]."

Leland tells the same tale of another historic name, "Edward, Duke of Buckingham, made a fair park hard by the castle at Thornbury, Gloucestershire and took very much fair ground in

[1] By refusing a Licentia Imparcandi. *Vide* ante, p. 72. Sir W. Forrest, *Pleasant Poesy of Princelie Practise*, 1548.

[2] Whitaker's *Whalley*, II. 188.

[3] *Ibid.* II. 64.

[4] *Ibid*, II. 188, "lay out," the opposite of "take in." Leland tells a similar tale about a Bishop of Sherborne, and a Bishop of Lincoln; (cited from the Itinerary. *Whalley*, II. 188).

it, very fruitful of corn, now fair lands for coursing. The inhabitants cursed the Duke for those lands so enclosed[1]." Sometimes however when great lords fell out, honest poor men came by their own. In 1544 it is recorded that hedges and dikes erected by a mesne lord were thrown down by his superior, under a claim of right of forest, and a complaint that they shut in the deer[2].

The competition for land by rich men for parks and pastures raised its rent enormously. The Poor Commons in their Supplication complain:—"Such of us as have no possessions left to us by our predecessors can get now no ferme tenement or cottage at these men's handes, without we pay them more than we are able to make." The rents are "much greater than hath of ancient time been paid for the same grounds." Sir W. Forrest urges that—

> "These raging rentis must be looked upon
> And brought unto the old accustomed rent,
> As they were let out 40 years agone.
> Then shall be plenty, and most men content;
> Though great possessioners list not assent:
> Yea—better it were their rents to bring under,
> Than thousand thousands to perish for hunger";

for now

> "What he" (the rich man) "unto his clampes catch may
> The poor man thereof no piece shall come by
> Cow Leys, horse grass, or one load of hay";

and again

> "Both lordships and lands
> Are now in few men's hands,
> * * * *
> With so many sheep masters
> That of arable ground make pastures.
> * * * *
> With commones and common ingenderes,
> Inclosieres and extenderes[3]."

[1] Leland, *Itin.* VII. 75 a.

[2] Whitaker's *Craven*, p. 525.

[3] Vox Populi, Vox Dei (1549). Ballads from MSS., p. 117.

Indeed the evil was felt to be so national, that the following prayer was inserted in one of the Liturgies of Edward VI.[1]:—

"We heartily pray Thee to send Thy Holy Spirit into the hearts of those that possess the grounds and pastures of the earth, that they remembering themselves to be Thy tenants may not rack nor stretch out the rents of their lands, nor yet take unreasonable fines...but may so let them out to others that the inhabitants may both be able to pay their rents, and also honestly to live and nourish their families. Give them grace also...that they...may be content with that which is sufficient and not join house to house and land to land, to the impoverishment of others, but so behave themselves in letting out their lands, tenements and pastures that after this life they may be received into everlasting dwelling places."

The action of the Lord Protector Somerset brought matters to a head. In answer to the complaints of the people that gentlemen had taken from them the use of those fields and commons and had enclosed them to parks and several pastures for their private advantage, the Lord Protector issued a proclamation against enclosures and taking in of fields and commons, that were accustomed to lie open for the behoof of the inhabitants, and ordered those who had enclosed these commons should lay them open again by the first of May 1549[2]. A commission was also appointed to redress enclosures in certain counties and one of the commissioners defined the enclosures he was to remedy as "when any man hath taken away any other men's commons, or if any commons or highways have been enclosed or imparked contrary to right and without due recompense, or if any one hath pulled down houses of husbandry and converted the lands from tillage to pasture[3]." Very few of those who had enclosed paid any attention to the proclamation, whereupon[4] "the misguided people presuming upon the proclamation took upon themselves to redress the matter, and chose to themselves captains and leaders, brake open the inclosures, cast

[1] Cited in Appendix to Tusser's *Points of Husbandry*, p. 237, E. E. Text.

[2] Holinshed, III. 1002.

[3] *Kett's Rebellion in Norfolk*, by Rev. F. W. Russell. London, 1859. cap. I.

[4] Holinshed, *loc. cit.*

down ditches, killed up the deer they found in the parks, spoiled and made havoc after the manner of an open rebellion. First they began to play these parts in Somerset, Bucks, Northamptonshire, Kent, Essex and Lincolnshire. In Somerset they brake up certain parks of Sir W. Herbert and the Lord Sturton ...shortly after the Commons of Devonshire rose by way of rebellion, demanding not only to have enclosures laid open, and parks disparked", but also on religious grounds. Somerset is reported to have sympathised with the dealings of the people as to enclosures—"he liked well the doings of the people[1]"—but that they should complain of his religious policy distressed him indeed. And religion and enclosures appeared in very different proportions as the subjects of complaint in different localities. As the Lord Protector said[2]:—"Some crieth, 'Plucke down inclosures and parkes', some for their commons, others pretend the religion." In the complaints of the Devonshire rebels enclosures or common rights have no place[3]; in Norfolk they are the main staple of grievance. In Cambridgeshire complaints took a more peaceful form. There was much reason for complaint—

> "For Cambridge bailiffs truly
> Give ill example to the country;
> Their commons likewise to engross
> And from poor men it to enclose."

A long series of complaints were presented as to "plowing up certain balks and cartways in the fields", and the like, and a number of offences were presented in the town of Cambridge itself[4].

"We find that Andrew Lambes' close is crofte land and ought to lie open with the field at Lammas as common.

"We find that Mr Braken hath dymissed a lane, fyssheres lane, and enclosed the same which of late lay open to the Common.

"We find that Trinity College hath enclosed a common lane, which was a common course both for cart, horse, and man

[1] Froude, *Hist.* IV. 408.

[2] Cottonian MSS.: cited Ballads in MSS. I. 116. Ballad Society.

[3] Froude, IV. 416—418.

[4] Cited Cooper, *Annals of Cambridge.*

leading to the river unto a common green, and no recompense made.

"We find that Queen's College have taken in a piece of common ground, commonly called Gosling green, without recompense.

"We find that Mr Osborne has in his hands a piece of marsh ground now severalled, which was common within these 16 years."

And so on through a long list of encroachments on commons and common fields. There were disturbances at Cambridge and fences were pulled down in Barnwell. The effect of some of these complaints is seen in the Cambridge Corporation Common Day-book, when on July 12, 1549, "Andrew Lambe granted that his close in Barnwell should lie common from Lammas to Lady Day", and it was "ordered that the common balk from Trumpington Street to the Brick Kiln should be laid common as customably it hath been used."

In Norfolk matters were far more serious[1]. On June 20, 1549, the poor people threw down the fences of one Green of Wilby, who was supposed to have inclosed a parcel of Attleborough Common. After this they were quiet except that secret meetings took place. A contemporary writer represents them as complaining[2]:—"The commons which were left by our forefathers for the relief of ourselves and families are taken from us, the lands which were within the remembrance of our fathers open are now surrounded by hedges and ditches, and the pastures are enclosed, so that no one can go upon them. We will throw down hedges, fill up ditches, lay open the commons, and level to the ground whatever enclosures they have put up."

In July, 1549, after a festival at Wymondham, a crowd went out and threw down certain bridges of one Hobartson's of Morley, and then returned to Wymondham. The next movement of the rioters found them their leader, and in a curious way. There was a hereditary animosity between the family of Flowerdews at Hethersett, and a family of Ketts, one member of whom, Robert Kett, was settled as a tanner at Wymondham.

[1] See Russell, *loc. cit.*

[2] Neville, *De Furoribus Norfolcensium.*

The rioters had cast down some hedges and ditches belonging to John Flowerdew, and this seems to have suggested to him a means of paying off old scores against the Ketts[1]: for he gave some of the rioters forty pence to cast down some enclosures of pasture made by Robert Kett at Wymondham, and they did so. But Kett, learning apparently by what means their attention had been directed to him, turned them back again to Flowerdew, and returning to Hethersett with Kett at their head, they laid open Master Flowerdew's enclosure there in spite of his protests and of a vigorous altercation with Kett; and Robert Kett's bearing in this matter so pleased the rioters that they made him their chief.

Under Kett's head they proceeded to Norwich, throwing down on their way the hedge surrounding the common pasture or "town close" of Norwich, a proceeding which, as that pasture was appropriated to the use of the poor freemen of the city, did not benefit much the poorer classes of the community[2]. On Mousehold Heath, near Norwich, Kett encamped with a great host of country fellows, and executed rough justice under the Reformation Oak; while his followers scoured the country, demolished the hedges and ditches of enclosed commons, and laid open the parks, killing the deer for whose sake the parks were fenced in. From Mousehold Heath Kett sent his petition of grievances to the King, Lord Protector and Council, and complaints as to commons and enclosures occupy a prominent place in it[3].

[1] Blomefield's *Norfolk*, II. 521; III. 223. About this time many complaints are exhibited against the Flowerdew family at Hethersett for ploughing up boundaries, enclosing lands, &c. See Blomf. IV. 25.

[2] This town close had itself its origin in a dispute as to commons. The citizens of Norwich had in 1205 granted the Prior of Norwich leave to enclose 40 acres of pasture for arable land, in consideration of their having common over the rest of the prior's land, and paying an acknowledgment for it, but there had been continued contention about it, the city being loath to pay the acknowledgements. In 1524 the city having given up its claim to commonage in Eaton and Lakenham, the Prior allowed the city to enclose 80 acres of common land, which afterwards was called "The Town Close." This close it was that Kett laid open. In 1739 its rents were paid to the poor freemen of the city. Blomefield, *Norfolk*, III. 196, IV. 517.

[3] Russell's *Kett*. Ballads in MSS. p. 147.

"We pray your Grace that no lord of no manner shall common upon the commons.

"We pray that the freeholders and copieholders may take the profits of all commons and thereto common, and the lords not to profit on or to take profit of the same.

"That your Grace will take all liberties of leet into your own hands whereby all men may quietly enjoy their commons with all profit[1].

"We pray your Grace that when it is enacted for enclosing that it be not hurtful to such as have enclosed saffron grounds, for they be greatly chargeable to them, and that from henceforth no man shall enclose any more.

"We pray that no Lord Knight Esquire or gentleman do graze nor feed any bullocks or sheep, if he may spend £40 a year by his lands, but only for the provision of his house."

Of the suppression of Kett's rebellion we need not write; enclosures continued, and also laws for the suppression of illegal appropriations of commons. In the same year a statute recited and confirmed the statutes of Merton and of Westminster the Second, but prohibited all other inclosures, except that houses on the common or waste land were to be left with arable land to the extent of three acres, or garden to the extent of two acres, the surplus being thrown into the waste[2]. In 1552, another statute required that all land which had been for 4 years in tillage since the first year of Henry VIII. should be put in tillage under a penalty of five shillings an acre, with the exceptions of land that had been pasture, common or waste for 40 years, land used to maintain a house, parks commonly used with deer, marshes &c[3].

These acts do not seem to have met with much success. In 1550 Crowley made a vigorous attack on the great farmers[4], "the cormorants and greedy gulls who take our houses over our heads, who buy our grounds out of our hands, who raise our rents,...who enclose our commons. There is not so much as

[1] This looks as if the Court Leets had been assuming a jurisdiction which did not belong to them, and which would prejudice the commoners, as in the Court Leet the steward was Judge, in the Court Baron the freeholders.

[2] 3 & 4 Edw. VI. c. 3.

[3] 5 & 6 Edw. VI. c. 5.

[4] *Way to Wealth*, E. E. Text Society, p. 132.

a garden ground safe from them." He pictures dramatically the contempt of the gentlemen for such complaints, representing them as saying of the poor:—"These are jolly fellows! They will appoint us what rent we shall take from our grounds. We must not make the best of our own. They will cast down our parks and lay our pastures open." And Crowley turns on them bitterly and says: "You enclosed from the poor their due Commons; yea, when there was a law ratified to the contrary your desire ceased not to find means either to compel your tenants to consent to your desire in enclosings, or else you made them afraid:—And what obedience showed you to the King's proclamation and commissions directed for the laying open of your enclosures...you left not off to enclose still...If the sturdy fall to stealing you are the causers thereof, for you dig in, enclose and withold from them the earth out of the which they should dig and plow their living[1]."

Crowley's advice to the poor man and tenant is in the highest strain of passive obedience, and suggests a remedy, not yet tried, for the Irish problem.

"If thy landlord do raise thy rent
See thou pay it with quietness,
And pray to God omnipotent
To take from him his cruelness.

* * * * *

But if thou wilt needs take in hand
Thine own wrong for to remedy,
The Lord himself will thee withstand,
And make thy landlord more greedy."

But the landlord was also denounced in verse[2],

"Yea that same land that ye dyd take
From the plowmen that laboured sore
Causing them wicked shifts to make
Shall nowe lie upon you full sore,
You shall be damned for evermore—

* * * * *

[1] Crowley's "Information and Petition against the oppressors of the Poor Commons of this realm." E. E. Text Society, p. 164.

[2] Crowley's *Last Trumpet*, E. E. Text, p. 122 (1550).

Let the poor man have and enjoye
The house he had by copyholde
* * * * *
Caste down the hedges and strong mounds
That you have caused to be made
About the waste and tillage groundes,
Making them weep that erst were glad."

In another pamphlet of the time:—"Certaine causes gathered together wherein is showed the decay of England only by the great multitude of sheep to the utter decay of household keeping, maintenance of men, dearth of corn, and other notable commodities, approved by sixe old proverbes[1]":—the great argument of the 15th century against enclosures is strongly urged from actual experience.

"Our complaint", says the writer "is for Oxfordshire Buckinghamshire and Northamptonshire...In the three said shires, many worshipful men sette no store nor pryse upon the maintenance of tillage of their lands, as before time hath been used, neither breeding nor feeding of cattle, but many of them doth keep the most substance of their landes on their own handes, and where tillage was wont to be now is it stored with great vmberment of shepe... There is not so many plowes used within Oxforthshire as was in King Henry VII.'s time and since his first coming there lacketh 40 plowes"—(afterwards he thinks 80); "every plough was able to keep 6 persons, down lyinge and uprisinge in his house, the whiche draweth to 240 persons in Oxforthshire...whither shall they go—into Northamptonshire, and there is also the living of twelf score persons lost;—whither shall then they go—forth from shire to shire and be scattered thus abroad...and for lack of masters, by compulsion driven, some of them to begge and some to steale...

"Each plough, besides keeping 6 persons, will give 30 quarters of grain per annum—so the food of 300 persons per county is lost." The *Remedy* suggested is "that there should be in every shire and hundred, as many plowes used, as many households kept, as in Henry VII.'s time; at least a plough in every town and village and in some townes and villages all the hole towne

[1] E. E. Text Society, (1550—3).

decayed since that time." Becon's Catechism in 1564 continues the complaint[1]:

"Divers gentlemen have been the occasion of all these tumults, through the great oppressions and wrongs that they have done to the poor commons, as by making common pastures several to themselves, by enclosing more ground to their use than heretofore hath been accustomed, and by this means taking away the necessary food from the poor men's cattle, without the which they cannot live, again by getting so many farms into their hands...

"If they once creep into a town or village, they for the most part never cease till they have devoured and eaten up the whole town... Who will be troubled say they with such a sort of shake-ragged slaves in a town, which do nothing but burn up our hedges, eat up the common, fill the town full of beggars' brawls."

Statutes of 1555 and 1562 confirm the statutes of Henry VII. and Henry VIII. against enclosures and for the restoration of tillage[2]: but through the chain of Statutes there run a series of exceptions under which enclosures were being made to promote:—1. the growth of woods. 2. the reclaiming of marshes and fens. 3. the national defence. Parks also are excluded from the operation of the act, and two Statutes to be referred to anticipate more modern legislation in a very complete way.

The growth of timber was first promoted by the legislature in a Statute of 1483, under which young plantations, which previously could only be enclosed for 3 years, were allowed to be fenced in for the space of seven years[3]. This Act was amplified by an Act of 1544, "An Act for the Preservation of Woods[4]."

Under this no woods were to be converted into tillage or pasture if they were more than 2 acres in extent, or were more than 2 furlongs from the dwelling house of the owner and occupier. If others than the owner had rights of common in the woods, the owner was to be allowed to cut down and sell one fourth of the wood, and to keep the ground several and preserved

[1] Parker Society, pp. 591—600.

[2] 2 & 3 Phil. and Mary, c. 2; 5 Eliz. c. 2.

[3] 22 Edw. IV. c. 7.

[4] 35 Hen. VIII. c. 17.

from cattle for seven years, if the quarter to be cut down was set out by the land-owner and majority of the tenants and inhabitants being commoners, and if the lord gave up for that seven years his common rights in the other three quarters; other inclosures were forbidden. This act was made perpetual by an Act of 1571[1].

Marshes and fens were dealt with by a series of Acts allowing undertakers to embank, improve and reclaim them, their reward being usually half the reclaimed land[2]. But these enclosures usually gave rise to great complaints among the fen inhabitants, who unwillingly exchanged their roving and predatory existence in the fens for the settled life of agriculture on the reclaimed lands. They therefore put all the obstacles they could in the way of reclamation, and we have two acts of 1530 and 1555 directed against those who cut the dykes in Marshland[3].

The national defence is used as a justification for inclosures, in an Act of 1555, directing commissioners to see to the enclosing and converting to tillage or other necessary manurance of parts of the northern counties within 20 miles of the Scotch borders[4].

The Statutes of Henry VII. and VIII. directed against the general evil are reinforced by many subsequent Statutes. In 1588 it is enacted that no cottage is to be without 4 acres of ground[5]. In 1597, two acts are directed against the decaying of towns, and in favour of the maintenance of tillage and husbandry, preventing the conversion of arable land into pasture; in these there are the usual exceptions of parks for deer and "marshes inned[6]."

[1] 13 Eliz. c. 25 § 2.

[2] See for examples—a series of Acts relating to the enclosure and maintenance of Plumstead Marsh—

22 Hen. VIII. c. 3,
14 Eliz. c. 15,
23 Eliz. c. 13,
27 Eliz. c. 27.

An Act of 1544 for the enclosure of Wapping Marsh by Cornelius Vanderdelf, half thereof to be vested in him (35 Hen. VIII. c. 9): and an Act of 1545 for the embanking of Greenwich marshes, 37 Hen. VIII. c. 11, *et sub.* pp. 105—110.

[3] 22 Hen. VIII. c. 11; 2 & 3 Mary, c. 19.

[4] 2 & 3 Phil. and Mary, c. 1.

[5] 31 Eliz. c. 7.

[6] 39 Eliz. cc. 1, 2; see also 21 Jac. I. c. 28.

Two acts of the century are however sufficiently modern in spirit to demand more notice. In 1545[1] an Act was framed for the partition of Hounslow Heath which recited that the King was seised of an estate of inheritance of the waste ground called Hounslow Heath consisting of over 4000 acres and lying in several parishes, and that its barrenness was the mother of dearth among the people dwelling on the confines of the Heath. Although the King might by the ancient laws of the realm justly approve a great part of the heath, yet it was thought desirable to appoint commissioners who should set out to every inhabitant in every parish a portion of the heath, either as copyhold in perpetuity or in a 21 years' lease, the lessees to improve their allotments without hindrance, and the commissioners to have power to make valid customs and order for the enclosure. This Act in spirit though not in form anticipates the private enclosure Acts of the 18th century. An act of Elizabeth's reign is prophetic of the legislature of this century. In 1592 it is enacted that under certain penalties "no person shall inclose or take in any part of the commons or waste grounds within 3 miles of the gates of the City of London, nor sever nor divide by any hedges, ditches, pales or otherwise any of the said fields lying within 3 miles &c., to the hindrance of the training or mustering of soldiers, or *of walking for recreation, comfort and health of her majesty's people,* or of the laudable exercise of shooting where there hath been usual exercise of shooting, and marks have been set[2]."

The long line of Statutes seems to have been all but useless against the rich and great men whose interest it was to violate them, and the end of the century is as fertile in complaints as its commencement. The "Anatomie of Abuses[3]" sets out that "landlords make merchandize of their poor tenants, racking their rents, raising their fines and incomes, and setting them so straight upon the tenterhooks that no man can live on them. Besides that as if this pillage and pollage were not rapacious enough they take in and enclose commons, moors, heaths and other common pastures, whereout the poore commonaltie were

[1] 37 Hen. VIII. c. 2.
[2] 35 Eliz. c. 6 § 4.
[3] by Stubbs (1583).

wont to have all their forage and feeding for their cattle and corn for themselves to live upon, all which are now in most places taken from them." Mr Trigge of Grantham in his Petition before cited[1], complains that "there is a mighty thorn sprung up of late...inclosure of fields and commons, whereas the lords of manors and freeholders will have all their lands which have heretofore lain open and in common, so that the poor might intercommon with them, now laid in several." The same author in his "Godly and Dutiful sermon preached at Grantham[2]", hits the cause of much of the mischief. "All towns", says he, "are almost decayed and undone: their common things and lands whereby the common stocks of their town hath been wont to be maintained by some means or other taken from them. Verily will the Lord one day call to account those that have decayed townships, have made a wilderness where were houses like flocks of sheep." The sheep were the offenders; and an epigram of 1598 bitterly attacks them[3]:

"Sheep have eat up our meadows and our downs,
Our corn, our wood, whole villages and towns:
Yea, they have eat up many wealthy men,
Besides widowes and orphane children;
Besides our statutes and our Iron Lawes,
Which they have swallowed down into their mawes:—
Till now I thought the proverbe did but jest,
Which said a black sheep was a biting beast."

As to the condition of England at the close of the 16th century we have slightly differing accounts from two contemporary authorities. Harrison in his Description of England[4], while he admits the prevalent tendency of the time, saying[5]:—"Certes sheep is more cherished in England than standeth well with the commoditie of the commons, or prosperitie of divers towns...whereof some are wholly converted to their feeding"—and again:—"Certes every small occasion is enough to cut down a great wood, and every trifle sufficeth to lay infinite acres of corn to pasture[6]....." and speaks of the resulting depopulation, an evil

[1] (1604), *vide* ante, p. 81.
[2] 1592.
[3] Bastard's *Chrestoleros*.
[4] Prefixed to Holinshed's *History*.
[5] III. c. 1.
[6] II. c. 22.

which the opponents of enclosures have always made one of their chief objections; "if the old records of every manor be sought and search made to find what tenements are fallen either down or into the lord's hands, or brought and united together by other men, it will soon appear that in some one manor 17, 18 or 20 houses are shrunk[1]": though he admits this yet he justifies the increased keeping of sheep, and lays very little stress comparatively on the evils of enclosures.

A more gloomy picture is supplied in Stafford's remarkable treatise in 1581. This work takes the form of a discussion between a Merchant, a Knight and a Husbandman—with a summary of the whole matter and suggestion of remedies from a Doctor[2]. Writing when there was a great scarcity and rise of price, the complaints of the people acquire double force. The sheep again are the innocent offenders:—"These sheep are the cause of all the mischief, for they have driven husbandry out of the country[3]."..."Marry, these inclosures and great pastures are a great cause of the dearth, whereby men do turn the arable land, being a living for divers poor men before time, now to one man's hands, and where both corn of all sort and also cattle of all kinds were reared afore time, now there is nothing but only sheep. And in the stead of 100 or 200 persons that had their living therefrom, now there be but 3 or 4 shepherds and the master only that hath a living thereof[4]"..."by reason of these inclosures many subjects have no ground to live upon, as they had before time, and occupations be not always set a work all alike.[4]" The effect of enclosures in increasing the ranks of the unemployed and the vagabonds and promoting disorder is frequently insisted on.

The Husbandman says[5]:—"These enclosures undo us all; for they make us to pay dearer for our land that we occupy, and cause that we can have no lande in manner for our money to

[1] Harrison, II. c. 19.

[2] "A compendious or Brief Examination of certain ordinary complaints of divers of our country men in these our days," by W. S. (Harl. Miscell. IX. 139): also published by E. E. Text Society; in the preface of which edition see discussion as to its authorship, which was at one time attributed to William Shakespeare!

[3] p. 149.

[4] p. 160.

[5] p. 147.

put to tillage; all is taken up for pasture; for pasture either for sheep or for grazing of cattle: in so much that I have known of late a dozen ploughes, within lesse compasse than 6 miles about me, laid down within this seven years, and where 60 people or upward had their livings, now one man with his cattle hath all: which thing is not the least cause of former uproars; for by these inclosures many do lack livings and be idle; and therefore for very necessity they are desirous of a change, being in hope to come thereby to somewhat, and well assured that however it befall with them, it can be no harder than it was before: moreover all things are so deere, that by their day wages they are not able to live."

The husbandman gives a graphic description of the causes which have led the smaller farmers to change the course of husbandry[1]. "Many of us saw long ago that our profit was but small by the plough and therefore diverse of my neighbours that had in time past some two, some three, some four ploughs of their own have laid down, some of them part and some of them all their teems, and turned either part or all of their arable land to pasture, and thereby have waxed very rich men. And every day some of us encloseth some part of his ground to pasture, and were it not that our ground lyeth in the common fields intermingled one with another, I think also our fields had been enclosed of common agreement of all the township, longe or this time...I that have enclosed little or nothinge of my grounde, could never be able to make up my lord's rent, were it not for a little herd of neate, sheepe, swyne, geese and hens."

The allusion to common fields is curious, as if the whole township agreed there seemed nothing, according to Bracton[2], to prevent them enclosing, but the reference to the intermingling of the fields seems to show that the idea of exchange of lands so as to consolidate their holdings had not occurred to Stafford.

The Knight as representing the landowning classes justifies enclosures and rise of rents by the general rise of prices. "Gentlemen fall so much to take farms to their hands, least

[1] Harl. Miscell. IX. p. 163.

[2] *vide* ante, p. 57.

they be driven to buy their provisions too dear; that is a great cause again that inclosures are the more used. For gentlemen having much land on their hand, and not being able to wield all and see it manured in husbandry, which requireth the industry, labour and governance of a great many persons, do convert most of that land to pastures, wherein is required both less charge of persons and of the which nevertheless cometh more clear gain[1]."

The Doctor, asked to show the remedy of "these great inclosures whereof all the realm complaineth so much and hath complained so long[2]", suggests very sensibly that the cause for the preferment for sheep over corn is that they are more profitable; and that the way to stop the conversion to pasture is to remove the restrictions on the trade in corn, especially its export, and to put more restrictions on the trade in sheep and in wool. Increasing population might soon be calculated on to create a greater demand for corn, and redress the balance of profit in favour of pasture.

To the agricultural condition of the common fields themselves, and the way in which some of them were enclosed allusion will be made hereafter. We have however a graphic description of the condition of Wiltshire in the last part of the century.

"This county" (says the historian[3]) "was then a lovely campania, as that about Sherston and Coteswold. Very few enclosures, unless near houses. My Grandfather Lyte did remember when all between Cromhall's (Eston) and Castle Combe was so, when Eston, Yatton, and Combe did intercommon together. In my remembrance much hath been enclosed and every year more and more is taken in. Anciently the Leghs (now corruptly called Sleights) i.e. pastures, were noble large grounds as yet the Demesne lands at Castle Combe are... So likewise in his remembrance was all between Kington St. Michael and Dracot Cerne common field. Then were a world of labouring people maintayned by the plough as yet in

[1] Harl. Miscell. IX. p. 181.
[2] p. 184.
[3] Aubrey, *Hist. of Wiltshire*, speaking of temp. 1550.

Northamptonshire, etc. There were no rates for the poore even in my grandfather's daies; but for Kington St. Michael (no small parish) the Church Ale at Whitsuntide did their businesse...

"Since the Reformation and Inclosures aforesaid these parts have swarmed with poore people. The Parish of Calne pays to the poore (1663) £500 per annum, and the Parish of Chippenham little lesse, as appears by the Poor's bookes there. Inclosures are for the private, not for the public good. For a shepherd and his dogge, or a milk mayd can manage that land, that upon arable employed the hands of severall scores of labourers."

The century shows great inroads on the waste lands and commons by men who were making their parks, and by great graziers seeking pasture for their flocks, and shows that such enclosures were not carried out with any regard for the interests of the poor or the surplus population they displaced. While actually the change was of great advantage to those who made it, very few justifications of that change appear in print, and the legislation of the century is directed against it, though owing to the greatness of the offenders that legislation does not seem to have been enforced. No facilities are put in the way of enclosure, and not many of the common fields seem to have become enclosed and several during the period, if we may judge from the references to common fields as obstacles to enclosure. Tusser's "several" country, which he opposes to the "open" or "champion" land, seems to date from an earlier period.

CHAPTER V.

Fens and Forests: Enclosures in the 17th Century.

The first half of the seventeenth century shows us two new features of importance in the history of enclosures and rights of common; the great fens in the Eastern Counties are drained and enclosed; and the Crown reasserts its ancient Forest Rights.

The old causes of complaint continue at work. There is a "Petition of the Diggers of Warwickshire to all other diggers[1]", in the reign of James I., in which the husbandmen complain of the great men and graziers. "They have dispopulated and overthrown whole townes and made thereof sheep pastures, nothing profitable to the Commonwealth. For the common fields being laid open would yield as much commodity, besides the increase of corn in which stands our life... Better it were that we manfully die than hereafter be pressed to death for want of that which these devouring encroachers do serve their fat hogs and sheep withal." The Northern Beggar Boy sings in the Ballad:—

> "My fields lie open as the highway:
> I wrong not the Country by greedy inclosing[2]":

and Sir Giles Overreach in Massinger's famous play speaks of his neighbour's abuse:—

[1] Cited, *Wit and Wisdom*, ed. Halliwell, New Shakespeare Society.

[2] *Circa* 1635, Roxburgh Collection, I. 543.

"As when they call me
Extortioner, Tyrant, Cormorant, or Intruder
On my poor neighbours' right, or grand Incloser
Of what was common to my private uses[1]."

In the manor of Wootton Bassett in Wiltshire, in the time of the Commonwealth, we have a lively picture of a lord encroaching upon commoners, who complain to the Parliament: "that soon after the manor came into the possession of Sir Francis Englefield, he did enclose the park, leaving out to the free tenants of the borough that part of it which was called Wootton-Lawnd, and contained only 100 acres... That notwithstanding this infringement of their ancient rights the inhabitants submitted to it without resistance, and established new regulations of common in conformity to the contracted extent of their lands, giving to the mayor of the town for the time being two cowes' feeding, and to the constable one cowes' feeding, and to every inhabitant of the said borough one cowes' feeding and no more, as well the poor as the rich, and every one to make and maintaine a certain parallel of bound, set forth to every person; and ever after that enclosure, for the space of 56 years, any messuage, burgage or tenement that was bought or sold within the borough, did always buy or sell the said cowes-leaze together with the said messuage or burgage as part or member of the same...about which time Sir Francis Englefield, heire of the aforesaid Sir Francis did by some means gain the charter of our town into his hands, and, as lately we have heard that his successor now keepeth it; and do believe that at the same time he did likewise gaine the deed of the said common[3]; and he thereby knowing that the town had nothing to show for the right of common, but by prescription, did begin suits in law with the said free tenants for their common, and did vex them with so many suits in law for the space of seven or eight years at the least, and never suffered anyone to come to trial in all that space; but did divers times attempt to gain the possession thereof by putting in of divers sorts of

[1] *New Way to pay Old Debts* (1633).

[2] Cited Britton's *Hist. Wiltshire*, Edin. (1814), pp. 642—644.

[3] i.e. the charter granting the common to the town.

cattle; insomuch that at length when his servants did put in cowes by force into the common, many times and present, upon putting them in the Lord in his mercy did send thunder and lightning from heaven, which did make the cattle of Sir Francis to run so violent out of the said ground, that at one time one of the beasts was killed therewith, and it was so often that people who were not there in presence to see it, when it did thunder, would say that Sir Francis' men were putting in their cattle into the Lawnd, and so it was; and as soon as those cattle were gone forth it would presently be very calme and faire, and the cattle of the town would never stir, but follow their feeding as at other times, and never offer to move out of the way: and this would continue so long, Sir Francis being too powerful for them, that the free tenants were not able to wage war any longer; for one John Rosier one of the free tenants was thereby enforced to sell his land (to the value of £500), with following the suits at law, and many others were thereby impoverished and were enforced to yield up their right, and take a lease of the said common of Sir Francis for term of his life; and the said mayor and free tenants hath now lost their rights of common in the Lawnd neare about 20 yeares, which this now Sir Francis Englefield, his heirs and his trustees now detaineth from them... And as for our common we do verily believe that no corporation in England is so much wronged as we are, for we are put out of all common that ever we had, and hath not so much as one foot of common left unto us, nor never shall have any; we are thereby grown so in poverty, unless it please God to move the hearts of this Honourable House to commiserate our cause, and to enact something for us that we may enjoy our right again."

What we have here in the particular is to be found sarcastically set out in the general in Lupton's "London and the Country Carbonadoed and quartered into several characters[1]." Speaking of enclosures he says:—"The landlords that enclose their villages are afraid that either the town or the land would run away as rebel from them; therefore they beleaguer

[1] Harleian MSS. ix. 326 (1622). book is dedicated to Lord Goring. Nothing is known of the author; the

it with deep trenches, and thorn roots for palisadoes; they could not make their trenches so easily if all were true within. The parson he is like a false cannoneer, that came by his place by simoniac means, and perhaps is sworn not to contest the enemy at all; or else if he doth give fire either to shoot over or on the side, never direct; or else he is poor, covetous, hopes to have some crackt chambermaid, or some bye-preferment, and so gives leave to the exacting landlord to do as he pleases. In this business the landlord is as lord general; the parson is as his horse that he rides, galls, spurs on and curvets with as he pleases, turns him and rules him any way, by a golden bit, a strong hand and ticking spurs. The bailiff is his intelligencer; which if he was either strapped or hanged outright, it was no great matter for his news. The surveyor is his quartermaster which goes like a bear with a chain at his side, and his two or three parishioners who walk with him, help him and undo themselves. The poor of the parish and other places are his chief pioneers, who like mould warps cast up earth. The parish he either wins by composition or famishes by length of time, or batters down by force of his lawless engines. Most of the inhabitants are incurably pillaged and undone. He loves to see the bounds of his boundless desires; he is like the devil for they both compass the earth about. Enclosures make fat beasts and lean poor people... Husbandmen he loves not; for he maintains a few shepherds with their curs. He holds those that plough the land cruel oppressors; for they wound it, he thinks, too much and therefore he intends to lay it down to rest. Well, this I say of him, that when he keeps a good house constantly, surely the world will not last long. There's many a one prays for the end of this one, and I wish it may be so."

In some parts of the country, these and similar grievances gave rise to serious disturbances. In Leicestershire and some of the neighbouring counties the rapid conversion of arable land to pasture, and the parks in which the gentlemen of the county enclosed their deer, aroused the anger of the inhabitants and commoners, and in 1607 a serious riot took place in which fences and park palings were everywhere thrown down. The riot was easily suppressed; but the King, who seems to have sympathised

with the poorer inhabitants, issued a Commission to inquire into the causes of the riots, with special instructions that "the poor should receive no injury by the encroachments of the richer neighbours[1]." However under the Commonwealth in 1655 there are again petitions "concerning enclosures in Leicester[2]."

In almost every manor similar causes were at work on a smaller scale. At Swaffham in Norfolk, the jury of the Manor Court find in 1620 the lord hath many great commons, and the tenants are not stinted in their common. The lord and his farmers have kept sheep on part of the demesne and common, about 1400, till of late that some part of the demesne, about 80 acres, have been ploughed; and 1400 sheep kept to the damage of the tenants[3].

The drainage and enclosure of parts of the great fen district which lay between Lincolnshire, Cambridgeshire and Norfolk, and Lincolnshire and Yorkshire, raised more serious difficulties[4]. Several of the marshes in the Thames estuary had, as we have seen, been reclaimed during the Tudor reigns[5]. The local peculiarities of the United Netherlands gave to the Dutch a skill and practice in dealing with dykes, which pointed them out as the proper heads of such works. Dutch names appear in the acts of the Tudor parliaments as "the adventurers", and the

[1] S. R. Gardiner, *Hist.* I. 355. See for details, *State Papers, Domestic*: Proclamations for suppression of persons riotously assembled for the laying open of inclosures: May 30 and June 28, 1607: Commissions issued to inquire about inclosures: Aug. 27, 1607. Pardons for offenders about inclosures, July 24, 1607, and March 30, 1608: Report by Sir E. Coke on the proceedings of the rioters, Sept. 1607. I do not think Mr Gardiner in writing that "in 1607 in the greater part of England the inevitable change from arable land to pasture had already been accomplished", can have had in his mind the extent to which, in spite of a large number of inclosures between 1760 and 1794, common fields, of course arable, prevailed over the greater part of England, according to the Reports then presented to the Board of Agriculture.

[2] *State Papers, Domestic*, Nov. 1655.

[3] Blomefield, *Norfolk*, VI. 201. It is not quite clear what the tenants complain of, it can hardly be surcharging the common, for the common is without stint. It may be that the tenants had common in that part of the demesne which was ploughed up.

[4] For authorities on the drainage of the fens, see Gardiner, VIII. 292—299. Allen's *History of Lincolnshire*, as cited: *State Papers, Domestic*, as cited below.

[5] *supra*, p. 94.

reclamation of the Yorkshire and Licolnshire fens was entrusted to a Zealander, Cornelius Vermuyden. He had been in treaty with James I., as to improvements in Cambridgeshire, but the negotiations had failed. In 1626 however an agreement was come to between Charles I. and Vermuyden[1], by which the latter engaged to do his endeavours to reclaim Hatfield Chase, Ditmarsh, the Isle of Axholme, and divers lands and waters of which the King was seised. Vermuyden was to have one-third of the recovered lands, and of the remaining two-thirds half was to be given to the tenants of the manors, and they were to be freed from the operation of the Forest Laws of Hatfield Chase. "The King engages to agree with persons claiming common"; but this like many of his Majesty's engagements was not easy to carry out. The commoners led a kind of predatory life, fishing and shooting wild fowl, a lazy, lawless existence, almost in a state of nature[2]. They kept a few geese, some sheep if well off, and perhaps a cow or a horse. They had freedom to range over a large tract of land, which they had hitherto called their own; and any change which would compel a settled and laborious life appeared to them odious, and they opposed it with the vigour that an open air career had given them. As one of the sufferers from their ravages under the Commonwealth wrote: "Nothing would fright and quiet them more than if there were a hundred of these desperate fellows pressed for the service of the fleet; they being all watermen and having little to do at home, make these night excursions" (to cut dykes), "and show their valour against General Whalley's men, which would be better employed against the Dutch[3]." This class of character viewed Vermuyden's proceedings with lively disgust; he was a foreigner, and his workmen were French, Flemish and Dutch. The lands allotted to the commoners were said to be the worst lands in the district; and during the progress of the works the draining of some lands rendered the floods worse on others. The local jury had declared the drainage to be impossible; the local magistrates sided with the commoners. They broke down

[1] Allen, I. 36.

[2] See description of the commoners of Holland Fen, Allen, I. 350; and post, pp. 139, 142.

[3] *S. P. Dom.* Aug. 31, 1653.

the embankments and the fences; they turned cattle into the corn which the adventurers grew on the lands reclaimed; they attacked the workmen and burnt their tools. The ringleaders were tried in the Star Chamber as commoners of Epworth, "for that they assaulted and beat the workmen, threw some of them into the river and kept them under water with long poles; and at several times upon the knolling of a bell came in companies to the works with others, filled up the ditches, burnt the tools, and set up poles in the form of gallows to terrify the workmen": and they were heavily fined. Vermuyden was knighted, and for some time was in favour at court. But his skill was doubtful, his want of tact certain: and by awards in 1629 and 1636 the commoners obtained substantial concessions[1]. The presence of the foreign workmen who had settled on Vermuyden's land was, as we shall see, long a cause of complaint: in 1656, the French and Dutch protestant strangers in Hatfield Chase Level petition that the inhabitants of the Isle of Axholme molest them, and make their church a slaughter house and bury carrion in it[2]. But in 1653 the Commissioners report that "the work has the appearance of being a great advantage to the Commonwealth[3]."

The other great scheme of drainage and enclosure was carried out on the Great Level on the Cambridgeshire Fens, where some 36,000 acres were in winter a vast expanse of water, in summer a dreary swamp growing a little coarse hay[4]. The Earl of Bedford[5] was at the head of the undertaking to reclaim this desolate morass, his undertaking being incorporated by Royal Charter, and his reward being a large portion of the reclaimed lands. Here again the fenmen who in boats and on stilts fished and caught wild fowl on the fens were up in arms. As verses of the time put it:—

"Behold the great design which they do now determine
Will make our bodies pine a prey to crows and vermin;
For they do mean all fens to drain and waters overmaster;
All will be dry and we must die, 'cause Essex calves want pasture[6]."

[1] Gardiner, VIII. 293; Allen, I. 44.
[2] *S. P. Dom.* April 15, 1656.
[3] *S. P. Dom.* July 28, 1653.
[4] Gard. VIII. 294.
[5] Hence the present "Bedford Level."
[6] Dugdale's *History of Embanking*, 391. Gardiner, VIII, 295.

The adventure was not more fortunate than that in Hatfield Chase. Those who succeeded the original company recited in a petition to Parliament "that the Adventurers' Company of the levels of the fens was originally undertaken by the late Earl of Bedford for the public good; the profits were not considerable to the charge and hazard; and most if not all of the adventurers with the said Earl ruined themselves by the undertaking[1]."

The Commissioners of Sewers certified in October, 1637, that the work was complete[2]. This seems to have been too hasty; in winter the lands were still flooded; and new Commissioners reversed the certificate. The commoners thought they saw their chance, and prepared "under pretext of a football match" to destroy the drainage works. The mob however was dispersed, and the ringleaders arrested. One of them declared: "He would not leave his commons till he saw the King's hand and seal...what, if one might be inspired to do the poor good, and help them to their commons again." The first drainage however was a failure; and on the authority of an Act of Parliament a new "Company of Adventurers of the level of the fens" was started, which after an expenditure of £300,000, constructed works "such as are not to be seen elsewhere", the annual charge for maintaining which was £10,000, but which gained for the Commonwealth a large and fertile tract of country[3]; and corn grew where a few years before a herd of deer had been caught swimming.

The Civil Wars relaxed all order and authority, and their effect is seen both in the attack and the defence of common rights. Some of the extreme enthusiasts in the cause of the Commonwealth turned their enthusiasm to the useful purposes of improving and enclosing common wastes, especially at St George's Hill, Surrey, notable as the site of Caesar's Camp, which has lately had to be preserved from nineteenth century Levellers. Jerrard Winstanley, whose views were such that he

[1] *S. P. Dom.* Aug. 1653.

[2] Gardiner, VIII: 296—7; See Prof. Gardiner's discussion of the relations of Cromwell and the King to these proceedings. Cromwell appears in Clarendon's *Life* as supporting with some vehemence the right of some commoners of the Queen's Manors of the Soke of Somersham near St Ives, whose "great wastes" had been inclosed. Clarendon's *Life*, Oxford, 1761. I. 78.

[3] *S. P. Dom.* Petition, Aug. 1653.

himself says: "I am called fool and madman, and have many slanderous reports cast upon me, and meet with much fury"; published in 1649 a pamphlet entitled: "A Letter to the Lord Fairfax and his Council of War, with divers questions to the Lawyers and Ministers: Proving it an undeniable equity that the Common People ought to dig, plow, plant and dwell upon the Commons, without hiring them, or paying rent to any. Delivered to the General and the Chief officers on Saturday, July 9, by Jerrard Winstanley in the behalf of those who have begun to dig upon George Hill in Surrey[1]." According to Winstanley, his digging and enclosing on the commons represents a pitched battle between the Lamb of Righteousness and the Dragon of Unrighteousness. The only persons who object to him are "one or two covetous freeholders who would have all the commons to themselves and would uphold the Norman tyranny over us." Winstanley and his followers on the other hand proposed to establish on the common lands a community having things in common, but Lord Fairfax's soldiers, not taking this view of the matter, had burned their houses and beaten them. Winstanley's view of the legal result of the Civil War is that as lords of manors and such like people derive all their title from the Norman Conquest, and as the Norman Conquest was defeated in the person of Charles I., the common people have recovered themselves from under the Norman Conquest, "and have the land freed from the entanglement of lords, lords of manors and landlords, which are our taskmasters." The common people ought therefore to enter into their inheritance and settle on any common without rent, for:—"we that are the common people ought to improve the commons for a public treasury and livelihood."

On the other hand there are numerous instances of attacks on enclosures to preserve the old common rights. There was a riot at Walsall in Staffordshire in August, 1653, "to cast down an enclosure made by Mr Pershouse[2]." But the fen districts

[1] Harleian Miscell. VIII. 586. A similar work is entitled: "The true Leveller's standard; or the state of community opened and presented to the sons of men. By William Everard on beginning to plant and manure the waste land upon George Hill."

[2] *S. P. Dom.* Oct. 1, 1653; Nov. 24, 1653.

were the scene of the most serious commotions. Lieutenant-Colonel John Lilburne, Carlyle's "Noisy John", who according to Sir Philip Warwick, "could not live without a quarrel; who if he were left alone in the world would have to divide himself in two and set the 'John' to fight with Lilburn, and the Lilburn with John"; this John Lilburne had found a very pretty quarrel in the fens, and as usual was in the thick of it. Major-General Whalley, who had in charge the fens, had troublesome work in protecting the Adventurers: there were riots; and dykes were cut; but "the Commissioners cannot discover the actors or abettors of the late riot, the business is so much in the dark, and so subtly and cunningly carried on by the country[1]." In October, 1650, "the inhabitants of the Isle of Axholme put many cattle into the Frenchmen's corn, and kept them there till June of the next year[2]." And with the actions went strong words. The commoners resisted the troops of the Parliament, "they would give no obedience to it; they could make as good a Parliament themselves; it was a Parliament of clouts." Noddel, one of Lilburne's associates[3], "would lay twenty shillings with any man that as soon as Lilburne came to London there would be a new Parliament, and that Lilburne would be one of them, and call that Parliament to account; and that having now finished with the commoners of Lincolnshire they would go into Yorkshire and do the like there, and then they would give the Attorney-General enough work to do; they would draw up their case and nail it to the Parliament door, and if they would not do them justice they would come up making an outcry, and pull them out by the ears."

On the Bedford Level there were similar riots. In August 1653 at Swaffham and Bottisham, 50 people came down armed by night and threw in the dyke, making very high and insolent speeches[4]. In 1656[5] one of the Adventurers complains that on June 16, "James Mawe and his son drove cattle into 60 acres of my meadow, and pulled down the fences. The tenants

[1] *S. P. Dom.* Sept. 5, 1653.

[2] *Ibid.* Aug. 21, 1656. There were similar riots in Oct. 1651, and Jan. 1653.

[3] Allen, *Lincolnshire*, I. 44.

[4] *S. P. Dom.* Aug. 30, 1653.

[5] *Ibid.* June 19, 1656.

neither dare repair the fences, nor drive away the cattle; and the commoners say they have as much right to defend their common with their swords as the Protector has the Government he has taken upon him; the justices of the peace dare not act against the pleasure of the commoners." Here as in other instances of enclosures of the fens, the most meritorious class of improvements is resisted by the least deserving class of commoners.

The other cause which in the first half of the 17th century affected enclosures of land and rights of common arose from no desire for the welfare of the people but only from the necessities of the King. Having quarrelled in 1629 with his third Parliament, Charles entered on the period during which for 11 years he governed in person and as his own Prime Minister. During those years the empty coffers of the Treasury were replenished by all manner of illegal exactions, of which Shipmoney is the most notorious; and it occurred to the mind of either Noy, the Attorney-General, or Lord Holland, the Chief Justice in Eyre, that many lands now enclosed or peacefully cultivated might be proved to be part of the Royal Forests, and that heavy fines might be imposed on those who had made encroachments[1]. There had been a great settlement of the forest boundaries in the perambulations following the Confirmation of the Charters in 1295; and this settlement had been accepted for 300 years; but the Crown sought to set this aside on the ground that this perambulation had disforested land newly attached to the forest in the reign of Henry II., which could not be so affected. The Crown lawyers began in the Forest of Dean, and there they had complete success. Fines amounting to £100,000 were imposed and the Crown obtained a large tract of land on which 17 villages had sprung up since the disafforestment, and which now passed under the forest laws. Under those laws no fence could be more than a certain height lest the deer should be hindered in their free roaming; sheep could not be kept on the commons, for the deer could not abide them; and all dogs within the forest must be maimed to prevent their chasing the game. These laws were enforced by the severe forest Court of

[1] Gardiner, VII. 363.

the Forest officials; and the fact that there were no deer in the forest did not affect their operation.

From the Forest of Dean, the Crown lawyers came to the Forest of Waltham[1], and on an old charter of Edward I., by browbeating the jury they obtained for the Crown an enormous extension of the forest, all lands south of the road from Colchester to Bishop's Stortford, though they had been out of the forest for 330 years, being declared to be within its limits. In the New Forest, the same procedure went on, being used to bring fines for encroachments, and money paid to quiet the title of neighbouring landowners into the king's exchequer[2]. In 1637 Rockingham Forest was reached; and the Court increased its bounds from six to sixty miles[3]. The Earl of Salisbury was fined £20,000; Lord Westmoreland £19,000: and others in proportion. But it was one thing to impose great fines, and another to get them paid. The Commissioners appointed to compound offences against Forest Law only realised £23,000 in two years and a half. The action of the King and the judges, while on the one hand it reduced the common rights of the poor, and on the other checked the action of the rich by adding Crown rights to those to be dealt with in enclosing, was prompted by a regard for the interests neither of the rich nor of the poor, but only by considerations of the private advantage of the King. When the Commissioners investigated enclosures and depopulation it seemed as if they were more intent on getting money by fines, than on protecting the rights of the poor.

[1] Gard. VII. 365; VIII. 77.
[2] *Ibid.* VIII. 86.
[3] *Ibid.* p. 282.

CHAPTER VI.

The Policy of Agricultural Gain: the 18th Century.

The great movement in favour of enclosures which took place in the last half of the 18th and first half of the 19th centuries must be viewed from two standpoints. It was a movement to get rid of the common fields, and to enclose the wastes and common pastures; and its two objects were not justified by altogether similar arguments. It is difficult to defend the common field system or even to understand how it could have been retained so long; the view taken of the commons and wastes by the advocates for their enclosure appears to the present generation short-sighted and narrow.

In 1794, when the Reports to the Board of Agriculture, hereafter referred to[1], were drawn up, and still more in 1760, before the tide of enclosure had begun to set in, a large portion of the land of England was in common fields, each village or township having, sometimes two or four, usually three of such fields, divided by landmarks, broad strips of grass called *headlands*, and *balks* of turf, into narrow parallel strips, divided amongst the inhabitants of the village, who held their land scattered about among the fields. These fields could only be tilled on a customary system of agriculture, and were subject to customary rights of fallow and common pasture.

Of the 8500 parishes (roughly speaking) in existence before the Reformation, nearly 4000 were enclosed from their open condition under this common field system between 1760 and

[1] *vide sub.* p. 137 et seq.

1844[1]. And in 1794 some English counties were almost entirely under that mode of culture, so far as their arable land was concerned. Great grazing counties such as Cheshire, Hampshire, Dorset, Shropshire, Sussex and Leicestershire were comparatively free from such fields. The north of England generally, though with abundance of waste lands, or as a writer in 1652 says "abounding with commons and ignorance", had yet but few common fields. In Durham they had been for the most part enclosed soon after the Restoration; in Lancashire and the North and East Ridings of Yorkshire but few common fields remained; in the West Riding alone were such fields extensive. In some counties, such as Essex, Kent and Suffolk, enclosures seem to have been all but completed in the 16th century, if not earlier, and Devon and Cornwall show but few traces of common fields.

But in other counties they were very extensive. Out of 147,000 acres under the plough in Cambridgeshire 132,000 were in open fields; in Huntingdon 130,000 acres out of 240,000 in the county were in a similar condition. Bedfordshire had 24,000 acres of open fields against 60,000 acres of arable land enclosed. In Hertfordshire there were many small common fields: Berkshire in its 438,000 acres had 220,000 of common field and down. In Bucks there were 90,000 acres; in the enclosed county of Essex 48,000 acres; the metropolitan county of Surrey had 12,000 acres, and even in Middlesex there were many common fields. In Hereford great part of the arable land lay open; in Lincolnshire 268,000 acres, one fourth of the arable land in the county, was in the common fields, and a large portion of Norfolk was in the same condition. In Northampton there were in 1794, 89 unenclosed parishes, while of the 227 enclosed parishes about half were recent enclosures. In parts of Notts there were 32 open and 54 enclosed parishes, while 20 of the latter had been enclosed since 1775. One third of Rutlandshire and 100 parishes in Oxfordshire were still in common fields; and this was so though between 1763 and 1794, the date of most of the Agricultural Reports, about 1500 parishes had been enclosed.

[1] Porter, *Progress of the Nation*, p. 146; Seebohm, *V. C.* pp. 14, 15.

The system thus widely spread throughout England was as wasteful and embarrassing to industry and enterprise as it is possible to conceive. As the strips of each farmer lay scattered one here and one there through large common fields, a great part of his time and that of his labourers was spent in journeying from one of his plots to another. "The land lieth in a confused manner in roods, acres and half-acres[1]." At Wendover in Bucks one tenant in 1794 held 18 acres in 31 allotments; but he was far outdone by a farmer in Gloucestershire, who had one acre divided into 8 "lands," spread over a large common field, so that he must travel two or three miles to visit the whole of his acre. The expense of reaping and carting was proportionately increased, and the horses had to be brought from distant commons to work: "the hay lies in so many little parcels in balks and lodes and at such a distance that it costs near as much in gathering as it is worth[1]." "Tenants under the same land owner", complains the Huntingdon Reporter, "cross each other continually in performing their necessary daily labour."

The culture of these strips was regulated by customary rules, which could not without loss to the farmer be broken, as the rights of pasturage on the fallows and balks enforced them.

"What champion[2] knows, that custom shows."

* * * * * *

"Two crops and away, must champion say", as old Tusser sums it up, continuing:—

"Good land that is several crops may have three;
In Champion Country it may not so be.
Ton[3] taketh his season as commoners may;
The tother[4] with reason may otherwise say.

* * * * * *

[1] *Vindication of a regulated Inclosure*, by Rev. Jos. Lee (1656).

[2] "Champion"; the title of champaign, or open country.

"One name to them both do I give now and then,
To champion country, and champion man."

T. Tusser, "500 *Points of Good Husbandry*, as well for the champion or open country as also for the woodland or several" (1573), ed. Early English Text Society.

[3] The champion.

[4] The enclosed.

Where all things in common doth rest,
Corn field with the pasture and mead,
Though common ye do for the best,
Yet what shall it stand you in stead;
There common as commoners use,
For otherwise shalt thou not chuse[1]."

The tenants of the fields were bound to keep exact time in the operations of agriculture, as otherwise their neighbours' rights of way and pasturage would ruin their corn. The owner of one strip had frequently the right of turning his plough on the land of another; as the Gloucestershire Reporter says: "the lands shooting in different ways some serve as headlands to turn on in ploughing others; and frequently when the good manager has sown his corn and it has come up, his slovenly neighbour turns upon it, and cuts up more for him than his own is worth." From the narrowness of the strips they could not be cross-harrowed or cross-ploughed. The growing corn was exposed to every kind of trespass from cattle and passers by, lying open as it did. Indeed commons and wastes were not favourable to scientific road-making. Roads over commons had seldom much assistance from the surveyor; in a wet season 50 yards on either side the usual track was cut to pieces rather than be at the trouble of making a good road in the middle. "Travellers know no highway in common fields", says Lee in 1656, "and spoil the corn and grass, especially herds of cattle, which by reason of the narrowness of the commons[2] do much harm to those lands which abut upon the pasture." It was impossible to grow any winter crops, such as turnips, vetches or artificial grasses, owing to the rights of pasture in the land every year from the time when the corn was cut throughout the winter, and for the whole of every third year when it ought to lie fallow. "Turnips are constantly cultivated in inclosures, but I know only one township in the West Riding of Yorkshire", says its Reporter, "where turnips are cultivated in perfection in the open fields."

The numerous owners of land, and the absence of any hedges and ditches in the open fields, rendered any satisfactory system

[1] p. 140.

[2] On the headlands and balks.

of drainage all but impracticable. In one or two exceptional parishes, such as Stretham in Cambridgeshire, the inhabitants had appointed a "*field reeve*", with authority to make drains at the expense of those in whose land they were; but the more usual habit was that of farmers at Eversden in the same county, who, when one of their number had made a new and complete system of drainage for his land, purposely stopped up the main drain, so that his drains burst and swamped his land. As the Gloucestershire Reporter says[1]:—"In water-furrowing one sloven may keep the water on and poison the lands of two or three industrious neighbours." Trenches and ditches opened by good managers for drainage were rendered inefficient by the shameful neglect of the common ditches and brooks; and the Reports are full of complaints of undrained open fields.

The open nature of the lands and the precarious character of the landmarks led inevitably to trespassing, to confusion of boundaries, and to quarrels. In 1656 we hear of "a practice too common in common fields, where men make nothing to pull up their neighbour's landmark, to plow up their land and mow their grass that lieth next them[2]." The Huntingdon Reporter in the next century complains of[3] "the self-interested farmers who plough up the balks and the headlands." The common fields were proverbial for quarrels and litigation; says Tusser:—

"Some Champions agree As wasp doth with bee.

* * * * * * * *

Great trouble and losses the champion sees,
And ever in brawling as wasps among bees.
As charity that way appeareth but small,
So lesse be their winnings or nothing at all[4]."

* * * * * *

"The Champion robbeth by night,
And prowleth and filcheth by day;
Himself and his beast out of sight,
Both spoileth and maketh away
Not only their grass but their corn,
Both after and e'er it be shorn.

* * * * * *

[1] p. 29.
[2] Lee's *Regulated Inclosure*.
[3] p. 10.
[4] 500 *Points etc.* E. E. Text, p. 103.

What footpaths are made and how broad,
Annoyance too much to be borne.
With horse and with cattle what road
Is made thorow everie man's corne:
Where champions ruleth the roast,
There daily disorder is most[1]."

In the next century we hear of "constant strife and contentions in the common fields for want of a mound to keep cattle within their own bounds...How many brawling contentions are brought before the Judges of Assize by the inhabitants of the common fields[2]." The herdsmen fall out; "men steal their neighbour's corn and grass that lyeth next to them and turning their cattle loose on purpose, when they pretend they break their fetters[3]." Edward Lawrence in 1727 sets out among the evils of common fields: "that the poor take their advantage to pilfer and steal and trespass...That the corn is subject to be spoiled by cattle that stray out of the commons and highways adjoining[3]"; and the Oxfordshire Reporter in 1794 recommends enclosure as a remedy for the "constant quarrels from the trespass of cattle and ploughing over boundaries." Tusser had vividly described the evils either of a joint herdsman, or of individual care:—

"When Champion wanteth a swineherd for hog,
Then many complaineth of naughty man's dog;
Where each his own keeper appoints without care
There corn is destroyed e'er men be aware[4]."

The customary course of culture, and the dependence on one's neighbours which the scattered plots of ground gave rise to, were fatal to all improvement, for the customary culture was not strict enough to secure good farming. For instance[5] in one parish in Suffolk, the course in the open field lands was one crop and two fallows; during the two years in which the field lay fallow, it was grazed by the flock of one farmer, who by prescription was the only person who could keep sheep in the parish, and who had also the sole rights of pasture on the Lammas lands after hay-harvest. No wonder that as the Reporter

[1] 500 *Points*, p. 142.
[2] Lee, *Regulated Inclosure* (1656).
[3] E. Lawrence, *The Duty of a Steward to his Lord* (1727), p. 37.
[4] 500 *Points*, p. 105.
[5] Suffolk Report, p. 15.

says: "nothing could be more beggarly than the crops or husbandry." In Cambridgeshire, Pampisford intercommoned with Whittlesford on 20 acres of land from hay harvest to Lady Day, with "a bite" on Easter Sunday. This "bite" by custom lasted from 6 a.m. to the end of church service, during which time so many cattle were driven on that all chance of a hay crop for the year was destroyed. In one Gloucestershire manor, the lord had the privilege of turning two colts into a lot-meadow, while the hay was growing, a right more beneficial to the colts than to the hay. These no doubt are exceptional cases; but the evils of common culture are everywhere complained of. In 1727 it is objected that "the tenants and owners are obliged either to keep exact time in sowing or reaping, or else to be subject to the damage and inconvenience of those who sow unseasonably, suffering their corn to stand to the beginning of winter, thereby hindering the whole parish from eating the herbage of the common fields till the frosts have spoiled the most of it[1]." The Bedfordshire Reporter explains more fully: "the occupiers of common fields are not necessarily tied down to any precise mode of management by the custom of any parish...for each occupier is only under an obligation to the others not to break up any of the common land, to set apart the regular fields or apportionment of fallow, to open his ditches and watercourses, and not to suffer the thistles and weeds to be seeded upon his neighbours[2], and to stock his field according to the practice of the parish. In all other matters he may drive the land, force it totally out of heart, first by negligence in fallowing, and next by sowing wheat upon all his fallowed land...and in all this mismanagement he does not infringe upon his brother farmers."

Chief in the difficulties which stood in the way of change was the natural conservatism of the English mind. Tenants at will labouring under the influence of habits and prejudices are not fond of varying much from the established mode of farming; and the condition of most open parishes was well epitomized in

[1] E. Lawrence, *Duty of a Land Steward.*

[2] There are however many complaints of thistle seed in the common fields.

the description of Taversham in Cambridgeshire: "inclosing not relished, the inhabitants being averse to innovation." In some parishes a change of culture by agreement was carried out, but this or exchange of lands was "loose and uncertain", and was almost invariably defeated after a time by the exercise of rights of pasture over the growing crops. The Berkshire Reporter speaks of "hitching the fields", an agreement amongst the parishioners to withhold turning stock out while particular crops such as turnips, vetches or clover were growing; yet he says "the lying open subject to commonage is a bar to all essential improvement, and cramps the spirited farmer who is disposed to make the most of his land[1]." In Bucks we see the agreement defeated. In one parish the parishioners by agreement got an Act of Parliament enabling them to exchange their land though not to enclose it, and accordingly they ploughed up the dividing balks. Fourteen years after one of the farmers suddenly and legally asserted his ancient rights of common by turning sheep on the clover crops where the balks had been[2]. At Steeple Claydon in the same county an agreement to change the course of one crop, one fallow, to one of two crops, one fallow, was broken down by one farmer's exercising his common rights after the system had been in operation a short time. As the Cambridgeshire Reporter says of one of the parishes in his county, "under the circumstances of the open fields no improvement can be made in husbandry[3]."

And these rights of pasture which played such a prominent part in open field culture were themselves capable of great improvement. The undrained condition of the land led to the prevalence to an alarming extent of rot and other diseases in the sheep. "Experience teaches", we hear in 1656, "that there are usually five rots in common fields for one in inclosures[4]." The Reports are full of complaints of the diseases of sheep on the commons and the impossibility of improving the breed of

[1] p. 29: see also Bucks Rep. pp. 27 et seq.; Oxfordshire, p. 11.

[2] Bucks Rep. p. 29.

[3] p. 11.

[4] Lee, *Regulated Inclosure*. Another writer of the time speaks of the commons as "wet and overgrown with furze, unsuitable for sheep"; and again, of the "disorderly feeding in common grounds by unsuitable cattle and without economy." S. Taylor, *Common Good* (1652).

animals which grazed promiscuously[1]. The Report of the Committee of the Board of Agriculture on Inclosures in 1794 illustrates the improvement in cattle from enclosures thus:—

		1710	1790
Weight at Smithfield of	cattle	370 lbs.	800 lbs.
„ „	calves	50 „	148 „
„ „	sheep	28 „	80 „
„ „	lambs	18 „	50 „

The Reporter for Bedfordshire thought the breed of neat cattle might be improved at least 40 per cent. by means of a general enclosure. In Berkshire, "we see on all the commons a number of miserable cattle, sheep, and horses which are a disgrace to their respective breeds and the cause of many distempers[2]." In Bucks a practical farmer "has lost on an average 70 sheep a year by rot in the fields[3]." In Cambridgeshire, at Trumpington out of a flock of 1950 sheep, 900 had died in one year of the rot and the remainder were sickly; in Croxton 1000 out of 1400 sheep had perished. In Cottenham 1815 out of 2600 sheep died; and this though adjoining parishes which had been enclosed and drained were free from the disease. In Oxfordshire the waste tract of Otmoor was common to eight townships, but owing to bad drainage and the absence of any stint on the number of cattle to be put on, the cattle had the moor-evil and the sheep the rot[4]. Not sheep alone suffered; horses in the common fields were tired and jaded with continual labour; and the cattle were driven about doing damage with their feet and harassed by their driving[5].

On many commons all the benefit of the pasture was lost by the number of cattle turned on. Tusser gives a graphic picture of the commons in the 16th century:

> "Some commons are barren, the nature is such;
> And some overlayeth the common too much:
> The pestered commons small profit doth give,
> And profit as little some reap, I believe.
>
> * * * * *

[1] See Bedfordshire, pp. 15, 26; Berks, p. 12.

[2] p. 59.

[3] p. 29.

[4] p. 23.

[5] Lee, *Regulated Inclosure*.

Some pester the commons with jades and with geese;
With hog without ring, and with sheep without fleece.
Some lose a day's labour with seeking their own;
Some meet with a booty they would not have known[1].

* * * * * * *

In Norfolk behold the despair
Of tillage too much to be borne,
By drovers from fair to fair
And others destroying the corn,
By custom and covetous pates,
By gaps and by opening gates.

* * * *

The flocks of the Lord of the soil
Do yearly the winter corn wrong;
The same in a manner they spoil
With feeding so low and so long;
And therefore that champion field
Doth seldom good winter corn yield[2]."

In this surcharging it was naturally the rich man who got the best of it. Fitzherbert warns his pupil against that evil: "Every man's tenant", he says, "ought of right to be stinted—for else would the rich man in the beginning of summer buy sheep and other manner of cattle and eat up the commons, and sell them again at winter, or put them in their pastures that they have spared all the summer, and so impresse the poor men that have no money to buy[3]." Edward Lawrence in 1727 sets out the abuses both by small and large tenants: "I should advise", he says[4], "the steward never to parcel his land to small freeholders in Townships where there are large commons without stint, though they will give double the value of the land... because those small freeholders only make use of their lands rented dear to put their cattle into at such times as the commons are under water, or in the winter when 'tis so cold and open that the cattle are ready to starve...for by such a contrivance the common would be so full stocked that the

[1] 500 *Points*, p. 105. As to the last line "Convey, the wise it call."

[2] p. 142.

[3] *On Surveying* (1523, 1539), c. 4. See also Lee's *Regulated Inclosure* (1656); for complaints of overstocking and surcharging by rich men; putting cattle in too early to graze and so damaging their milk, etc.

[4] *Duty of a Steward*, p. 81.

Lord's tenants who reap large farms would not receive their proportion of advantage...Thus again in other townships where 'tis the custom to stint the commons and common fields, the steward should take care that the richer tenants do not stock them beyond the custom of the manor. I have often found this abused to a great degree to the no small damage of the poorer tenants, who are not always in a condition to buy such stock as is their due to put on. In such cases the steward should oblige the richer tenants not to put in beyond their stint, without making an allowance to the poor for the sheep that they put in above their number in their stead, and by no means to suffer the whole to be overstocked. These abuses used formerly to be strictly observed at the Court Baron, but of late years have been little regarded, except in some manors where the steward would present them that offended, and the more when he found the substantial tenants had agreed together not to present one another, and to crush their poorer tenants that should offer to do it."

Many of the owners who had common rights used them for their profit by taking in the flocks of strangers to graze, and so surcharging the common. In Lincolnshire the Reporter complains that, the common being without stint, the cottagers take in flocks of foreigners as their own, and greatly surcharge it. In 1801, Wymondham Common in Norfolk is described as of 2000 acres, in which 9 other towns intercommon. It would let if enclosed for 20/ to 25/ an acre. "The benefit to the poor is little or nothing further than the keeping a few geese; as to cows there are very few. The common is so overstocked with sheep that cows would be starved on it; these sheep are mostly in the hands of jobbers, who hire small spots contiguous to the common for no other purpose. These men monopolise almost the whole...rots are frequent[1]." On Hounslow Heath in 1794 almost the whole heath was sacrificed "to a few opulent farmers who live on its borders and put in an immense number of greyhound-like sheep, pitiful starved-looking animals, subject to rot. These with a few cottagers who cut turf and fuel for sale and keep a parcel of ragged shabby horses that are continually

[1] Arthur Young, *Enclosure of Wastes* (1801).

breaking into the neighbouring fields, are the only persons who have any benefit by the commons in their present uncultivated state[1]." And so long as the common rights existed, it was difficult to get any improvement in the land or pasture. As the Yorkshire Reporter says of the East Riding, "it is not a little extraordinary to see a starving stock upon a common of 500 acres soaked with water, when the expense of a few shillings for each right in drains and bridges would double its value[2]."

Before dealing with legislative and other attempts to improve this state of things, two vivid pictures of its actual working may be given. In the 16th century we have a set of records concerning the lands in Craven belonging to the Earl of Cumberland. In them we find first a series of complaints of the impoverished condition of the arable land and requests that it may be exchanged for pasture which may be ploughed.

"Manor of Marton...To the Countess of Cumberland.

"May it please your honour concerning the common of pasture of Marton Moor, in my late Lord's lifetime, whose soul God pardon, his Lordship's tenants of Marton by supplication requested his Honour that they might take up a piece of the moor of Marton to sowe, or else they were utterly undone for corn. His Lordship did answer that they should have it, so that the manor place should have the quantity of ground of the said moor to sow for his money as they had for theirs...Then it pleased God to take my lord to his mercy before any order made[3]." Here the arable land worn out by bad culture is to be exchanged for pasture to be broken up, the tenants giving up their claim of common on other ground to satisfy the lord's representative at the "manor place." In the next extract we see another class of claimants.

"The petition of the inhabitants of Carlton to the Earl of Cumberland.

"Whereas the summer pasture belonging to your poor orators and tenants, the inhabitants of Carlton, is very barren ground for grass and pasturage, by reason of the hilly ground

[1] Middlesex Rep. pp. 23, 31.

[2] See also *Advantages and disadvantages of inclosing waste lands and open fields*, by a Country Gentleman.

[3] Whitaker's *Craven*, p. 91.

and high lying of the same, yet fruitful of corn, as by sowing the same heretofore they have tried; and because they have much other ground which by long occupying of the same with sowing is become very unfruitful and barren for corn, and cannot be manured without pasturing"...the tenants prayed "that they might have sown the same pasture again. But certain freeholders there would not agree in no wise unless that they might have their parts of the said pasture wherefore your orators pray that your Grace will not only suffer that the freeholders there might have their parts, but also that your poor tenants might divide and take theirs in by themselves likewise[1]." The Earl's Council direct the land to be surveyed.

Other documents show the quarrelsome conditions of the little communities, where the freeholders and the cottagers or customary tenants continuously wrangled as to their respective rights.

"Right Noble Lord: We your poor suppliants the inhabitants of both the Martons...suppliantly complaineth the lamentable ruin of ourselves for want of corn and other good order which hath been heretofore among us as well in plowinge and sowinge as pasturing namely of piece of ground lying above the town... which most profitably was kept for the pasturing and grazing of oxen and kye comminge to our doores: and another parcel was orderly used for the grazing of sheep...and another parcel... being most profitable for getting of corn was used in plowing and sowing...yet through W. Redmayne tenant of the manor house on the one side and W. Hayber of the other so many strange cattle were into the same ground taken...by this means your poore orators lost our cattle, being so starved in the summer that they wholly died in winter." To this the Earl of Cumberland replies in the tone appropriate to a Lord of the Manor:

"The Earl of Cumberland to the Court keeper of the Manor at Marton.

"I perceive that Heyber and other my freeholders in my manor of Marton pretendeth to have common within my ground called Marton Moor, in such manner as they would at length

[1] *Craven*, p. 223: the last is apparently a request to enclose in severalty what would otherwise be in common.

disinherit me thereof, specially that the said freeholders have disturbed my servant R. Redmaine tenant of the capital mansion there and impounded his cattle and abused my court there in amercing the said Robert, contrary to all equitie and justice... now my will is that you command the said Heyber and others within the said town to permit the said Robert &c."...and all the other tenants were to aid him or else forfeit their freeholds[1].

In the same century an old dispute between the "husbands[2]" and cottagers at Skipton broke out. The cottagers claimed a right of turning their cattle upon the open fields to eat up the stubble-edish, along with those of the husbandmen, as soon as the corn was housed. The cottagers by the mouth of old inhabitants proved this to be an ancient custom, that 40 years before the husbands had complained, and that the first Earl of Cumberland decided that the cottagers had no right to turn their cattle into the Ings[3], and that as to the stubble-edish the husbands should turn in their cattle for "overhushing" a day or two for an hour in a day, after which the goods of both should run in common till winter; and to prevent trespass upon the newsown wheat, the husbands should, at their own expense, hedge in a certain part of the common field.

The first practical suggestions for the improvement of this state of things comes from Fitzherbert in 1523. He suggests the enclosure and freeing from rights of pasture, in the first place of the lord's demesne lands[4]:—"It should be understood whether the demesne lands lie in the common fields among other men's lands or in the fields by themselves. And if they lie in the common fields, it is convenient that they be plowen an sowen, and there is not an acre so much worth as it were severalty inclosed or in several pasture. For if the field be inclosed about, then it is at the lord's pleasure whether they shall lie to pasture or to tillage, and though it lie in tillage yet hath the lord the edish and the aftermath himself for his own cattle. And therefore one acre is at the more value, and, if it lie in pasture, the pasture may

[1] 4 Oct. 1557; Whitaker's *Craven*, p. 91.

[2] Occupiers of land.

[3] Meadows.

[4] Fitzherbert *on Surveying*, 1523, 1539, c. 2.

be such that it is at double or treble the value of the arable land. Wherefore the acres are to be praised accordingly, and if they be by great flattes or furlongs in the common fields it is at the lord's pleasure to enclose them and keep them in tillage or pasture so that no other man have common therein." But at the end of his work he goes further and advocates a general enclosure. In a chapter entitled; "How to make a township that is worth 20 marks a year, worth £20 a year", "It is undoubted", he says, "that to every township that standeth in the plain champion country there be arable lands to plough and sow and leys to tie or tether horses or mares upon and common pasture to keep and pasture their cattle upon. Also they have meadow ground to get their hay upon. Then let it be known how many acres of arable land every man hath in tillage, and of the same acres in every field to change with his neighbours and to lay them together, and to make him one several close in every field for his arable lands and his leys in one field, to lay them together in one field and to make one several close for them all—and also another close for his portion of the common pasture and also his portion of the meadow in a several close by itself and all kept in several both in winter and summer, and every cottage assigned him according to his rent." After a statement of the resulting agricultural advantages he continues: "The most indifferentest mean to make these approvements, as me seemeth, is this. All the lords of one town, be there never so many, should all be of one assent that their tenants should exchange their lands one with another, and the said exchange to stand so that every man may have one little croft or close next to his house, if it may be, though he may have no land of his owne. This done" a lease is to be granted to every tenant of his plot, on condition that he hedge and enclose it[1].

A defence of enclosure on the ground of its agricultural advantages is to be found in a document in the Record Office compiled in 1529, which argues that "plenty hath been and is by reason of pasture; for always when a general murrain of sheep and all other cattle is in common fields, then very little

[1] p. 54, ed. 1539. The policy of "three acres" is here hinted at; the "cow" is still in the background; *vide sub.* p. 149.

or none in pasture. And so in pasture is there bred and kept much cattle, and as often as the common murrain hath fallen on the common fields, the pastures have relieved the common fields again with their breed of their cattle[1]."

From Tusser's works in 1557 and 1573 graphic pictures of the evils of "champion country and champion man" have already been given; he argues strongly in favour of inclosures[2]:—

"The countrie inclosed I praise;
The tother delighteth not me;
For nothing the wealth it doth raise
To such as inferior be.
* * * *
For Champion differeth from Several much
For want of partition, enclosure and such.
* * * * * *
Example by Leicestershire;
What soil can be better than that
For anything heart can desire,
And yet doth it want ye see what;
Mast, covert, close, pasture and wood,
And other things needful as good.
* * * * *
All these do enclosures bring,
Experience teacheth no less,
Example if doubt ye do make
By Suffolk and Essex go take."

The several and enclosed pastures, he urges, give most mutton, beef, corn, butter and cheese:

"More work for the labouring man
As well in the town as the field.
* * * * *
More profit is quieter found
Where pastures in severall be,
In one seelie aker of ground
Than Champion maketh of three.
Again what a joie is it knowne
When men may be bold of their owne."
* * * * *

[1] MS. found by Prof. Brewer: cited Pref. Ballads in MSS. p. 18. Furnivall.

[2] *A comparison between Champion Country and Several.* E. E. Text Society, p. 140.

and he concludes with a remonstrance with the commoners who even then were protesting against enclosures:—

"The poor at enclosing do grudge,
Because of abuses that fall;
Lest some man should have but too much,
And some again nothing at all.
If order might therein be found
What were to the general ground.

* * * * *

For commons these commoners cry;
Enclosing they may not abide;
Yet some be not able to buy
A cow with a calf by her side;
Nor lay not to live by their work,
But thievishly loiter and lurk."

Tusser, it will be noticed, says nothing of the method of enclosures; Stafford in 1581 argues in their favour if made by agreement of the proprietors and with due consideration of existing rights. The Knight, in his dialogue, has urged that "the countries where most enclosures be are most wealthy, as Essex, Kent, Northamptonshire; tenants in common be not so good husbands as when every man hath his part in several." To which the Doctor, who represents Stafford's own views, replies: "I mean not to condemn all inclosures nor yet all commons, but only of such inclosures as turneth common and arable fields into pasture, and violent inclosures of commons without just recompense of them that have right to common therein; for if land were severally enclosed to the intent to continue husbandry thereon, and every man that hath right to common had for his portion a piece of the same to himself enclosed, I think no harm would come of it, if every man did agree thereto; but yet it would not be sodainly done; for there are many poor cottagers in England which having no lands of their own to live upon, but their handy labour and some refreshing upon the said commons, which if they were suddenly thrust out from that commodity might make a great tumult and a disorder in the commonwealth, and per case also if men were suffered to inclose their grounds under the pretence to

keep it still in tillage, within a while after they would turn all to pasture as we see they do now too fast[1]."

Nordon in 1602, in his Surveyor's Dialogue, argues that "one acre inclosed is worth 1½ in common if the ground be fitting thereto; and if the wastes and unprofitable commons in England were inclosed and proportionally allotted it would feed more people by good manurance than any one shire in England." But while in the interests of the country he argues thus, as a surveyor in the interest of his lord he directs that the Court shall inquire "whether it is lawful for the tenants to inclose any part of their common fields or meadows without the license of the lord and consent of the tenants", an inquiry which he explains to be directed against enclosure by great men without the licence of lord and tenants, which cannot be permitted, even though the enclosures be thrown open at Lammas Day. Encroachments on the lord's wastes, he says, are not rare, "especially when the lord nor his officers walk not often and where tenants for favour or affection will wink at evildoers, or for their own private lucre commit the same error themselves with hedges ditches pales walls and sheds."

Apart from forcible enclosures by lords of manors and great men, or encroachments on the waste by squatters, the only method of enclosure of the whole of the common fields and wastes was by a voluntary agreement between all the proprietors of land and persons having rights of common, under which agreement usually commissioners were appointed to allot the lands to the persons interested. This agreement was frequently confirmed by the Court of Chancery, or, if the Crown had rights, it was sanctioned by Royal licence; the sanction of Parliament was not resorted to before the reign of Charles II. Thus in 1529 the town fields of Padiham were enclosed and divided by "Sir John Townley, Nicholas Tempest and Nicholas Banister, commissioners for inclosures[2]." In 1592 we find bargaining taking place:—"Mr Metcalfe, the lord of the manor (in Craven) would not suffer the enclosure of the moors till the town granted all his tofters and crofters old and new

[1] Stafford's *Brief Concept.* Harleian MSS. IX. 160.

[2] Whitaker's *Whalley*, II. 53.

one cattlegate in Lower Close[1]." Skipton town fields were enclosed before 1612[2], and the manor of Ightenhill by licence of enclosure dated June 25, 1624[3].

Under the Commonwealth, besides the Levelling literature to which allusion has been made[4], a work entitled:—"The Common Good, or the improvement of Commons Forests and Chases by Inclosure, wherein the advantage of the Poor, the Common Plenty of all, and the increase and preservation of timber are to be considered[5]"; is noteworthy because in dealing with the commons, which the author estimates as one-sixth of the land of England, he proposes a general scheme of allotment applicable to all commons. They are to be divided into four parts; the first to be applied to the use of the poor, each present cottager having land in proportion to his family; the second to the lord of the manor; the third and fourth to the freeholders and copyholders, while every twentieth acre is to be planted with wood and good large highways are to be laid out. A few years later we have an amusing picture of the local difficulties of enclosure, in a little tract called:—"A vindication of a Regulated Inclosure, wherein is plainly proved that Inclosures of Catthorp in Leicester in particular are both lawful and laudable; as also that those evils which do too usually accompany inclosure of commons are not the fault of inclosures, but of some inclosures, by Reverend Joseph Lee[6]." The reverend gentleman had apparently been attacked in sermons and otherwise by some religious neighbours for the part he had taken in the enclosure of the common fields and commons of Catthorp, and he has felt bound to justify himself in pages which are interesting because, while wrestling on scriptural grounds with the texts with which he had been pelted, he also deals with them in a scientific spirit by quoting facts from his own experience. Thus he has been told that enclosers are punished in their posterity, who never retain the lands their fathers have enclosed; (this indeed appears to have been a

[1] Whitaker's *Craven*, p. 54.
[2] *Craven*, p. 429.
[3] *Whalley*, II. 179.
[4] Ante, p. 109, Cap. v.
[5] Written by S. Taylor (1652), pp. 35—38.
[6] (1656).

prevalent country superstition, for John Cowper, writing against enclosures in 1732, says it is common talk that "he who incloses a common either seldom lives to see the hedges grow up, or at most the estate seldom remains in the family's name many years. This", he says, "has indeed frequently been seen"); but Mr Lee replies that as a fact common fields continually change hands, and that only one family in Catthorp common fields had held their lands for three generations, so that the curse appears to be not confined to enclosures. He is told that enclosures will depopulate the town, and he replies that 19 towns have been enclosed near Catthorp within 50 years, in none of which has depopulation or decay of houses taken place; that where there is driving away of people it is where the town is in the hands of one or a few men, but Catthorp is held by eight freeholders, and there are six ancient cottages, also freehold. He is told it will decay tillage, and he cites 15 towns within 3 miles of Catthorp where it has not had that effect. He is very much in favour of the enclosure of the common; at present it "ruins the souls of shepherd boys who when they should be at school are playing nine holes under a bush, and their cattle make a prey on their neighbour's corn": whereas when enclosure takes place, what is now worth 8/ per annum, will be worth 35/; 14 acres will be given to the poor, "who have now no part of the fields or commons belonging to their houses"; and there can be utilized certain "small parcels of land called church headlands and church leys which have been set apart not by any particular man's donation but by common consent for repair of the church or whatsoever other public use the town appointeth." His opponents he classes under two heads; "the ruder sort of people, who seldom keep their cattle within their own bounds, but daily make a prey upon their neighbour's corn and grass, overstore their commons, and plow up their neighbour's land", and "self-ended graziers" who object because the multitude of cattle that would be fed in enclosures would spoil their trade; and it must be allowed he makes an effective answer to both.

The 19 towns enclosed within the 50 years, 1606—1656, to which Mr Lee refers, were presumably enclosed by agreement

among the proprietors, the agreement being, if necessary, confirmed and decreed by the Court of Chancery, in the exercise of a jurisdiction which is now abandoned[1]. It is apparently during the reign of Charles II. that the decree of the Court of Chancery is supplemented, to be finally superseded, by a private Act of Parliament appointing Commissioners to make the enclosure and exchange of lands, and confirming the agreement of the proprietors to enclose. There are two such Acts in the reign of Charles II., but none in the reign of James II., William III., and Anne[2]; after this they gradually grow more plentiful. A writer in 1712 very shortly declines to argue the advantage of enclosures; when he considers the great quantity of ground daily enclosed and the increase of rent that is everywhere made by those who enclose, he will not endeavour the conversion of those that matter of fact is not able to make sensible of their own advantage[3]. An opponent of enclosures in 1732 says on the authority of an "eminent surveyor", that one-third of the land of England had been enclosed within the last 80 years, which, with deference to the eminent surveyor, must be an enormous exaggeration[4]. A writer in the same year says that the wastes "will be barren for ever, without proper acts of Parliament to enclose them, which acts of late years have in many cases been the occasion of great improvements, and even the last two years have obtained so much that I find several commons are now going to be enclosed[5]."

Part of this movement in favour of enclosures by Act of Parliament which was making itself thus noticeable about 1730 was probably due to the writings of the brothers Laurence. They in their turn had been preceded by a quaint writer who published in 1710 a work called "An old Almanack with a Postcript." He makes two suggestions:—(1) that the Statute

[1] For an example of such an enclosure, see that of Aston and Cote in Oxfordshire in 1663, cited Williams *on Commons*, p. 247.

[2] Williams *on Commons*, p. 249. The Act of Henry VIII. enclosing Hounslow Heath is on somewhat similar lines. *Vide* ante, p. 95.

[3] *Whole Art of Husbandry*, by J. Mortimer, F.R.S. (1712), p. 2: see also, *New System of Agriculture:* by Rev. John Laurence (1726), p. 46.

[4] John Cowper. *Essay against Inclosing.* 1732.

[5] *The Advantages arising from Commons enclosed.* Lond. 1732.

of Merton should apply against copyhold as well as freehold tenants, and (2) that the agreement of the lord of the soil together with two-thirds both in number and value of the tenants assenting to an enclosure should suffice to bind the dissenting minority, who however were to have the same proportion of the enclosure as if they did assent. This, he urges with some sarcasm, can be objected to by nobody. "Will the cottagers complain for want of their commonage? This they can't do, for few of them have any cattle, and whether they have or not there is recompense out of the inclosures will more than treble their loss. Will the engrossers of commons complain, who eat up their own share and others' too. This they dare not. But won't those honest men complain who live upon the thefts of the common? And not with the least reason, for then there will be work for them. The inclosures lately made without falling the value of neighbouring lands, show inclosures will not harm neighbouring lands."

The "New System of Agriculture" published in 1726, by the Rev. John Laurence, is chiefly an exposition of the undoubted agricultural advantages of enclosures in greater produce and rent "sometimes tenfold increased." He estimates that one half of the kingdom is common, and that of that half two-thirds are common fields, and "wonders that the people of England should be so backward to inclose which would be worth more to us than the mines of the Indies to the King of Spain." He argues against the objection that enclosures injure the poor on the ground that "wastes and open spaces draw to them the poor and necessitous only for the advantage of pilfering and stealing", and that enclosures will provide them at first with the labour of making hedges and ditches, afterwards in tillage and pasture. The work of his brother Edward Laurence, a land surveyor, who published in 1727 "The Duty of a Steward to his Lord", is more noticeable, as it throws great light on the complaint that the poor were oppressed. From the lord's point of view, the author recommends the suppression of all small tenants as speedily as possible. "A steward as much as in him lieth and without oppression should endeavour to lay

all the small farms let to poor indigent people, to the great ones[1]... A vigilant steward should be zealous for his lord's sake in purchasing all the freeholders out as soon as possible, especially in such manors where improvements are to be made by inclosing commons and common fields, which, as everyone who is acquainted with the late improvements in agriculture must know, is not a little advantageous for the nation in general as well as highly profitable to the undertaker. If the freeholders cannot all be persuaded to sell, yet at least an agreement for inclosing should be pushed forward by the steward[2]"... "The steward is to get rid of farms of £8 or £10 *per annum*, always supposing that some care be taken of the families[3]"... "He should be ever on the watch to prevent if possible the freeholders inclosing any part of their land in the common fields, which commonly ends in lessening the tillage and increasing the pasture"... "Where the freehold tenants have a township entire to themselves the steward should take care that they do not encroach upon the Lord's waste by digging stone, sand etc., exposing the same to sale when it is none of their right. I have known instances, where the freeholders have inclosed the lord's waste down to the seaside, insomuch that in process of time they have gained considerable quantities of land, and were beginning to dispute even the privileges of the lord." It is true that the steward is to show some slight consideration for the tenants. He is to keep the deer in the park:—"too many landlords are careless in this affair, and don't consider the great damage done to the industrious tenants by not keeping the deer from the tenants' cornfields": and he is not to allow rabbits unless the warren is at least three miles from enclosures or common fields; but the spirit of the work is that of a steward who sees less trouble in the management of his estate and more secure returns to his lord, if the township can be enclosed and thrown into large farms, and who therefore proceeds to get rid of the small tenants.

This is one of the chief grounds of a vigorous though rather irrational protest against the works of the two Laurences

[1] p. 35. [2] p. 37. [3] p. 47.

published in 1732 by John Cowper, entitled "An Essay proving that Inclosing Commons and Common Field Lands is contrary to the interests of the nation." Than these small freeholders whom Edward Laurence wishes to suppress, he says "none are more industrious, none toil and labour so hard", and it is they and the poor who feel the effects of enclosures. Their allotments are bought up by the lord, and they become vagabonds. "I myself have seen within these 30 years, above 20 Lordships or parishes enclosed, and everyone of them has thereby been in a manner depopulated. If any man can show me where an enclosure of a common or open field pasture has been made, and not at least half the inhabitants gone, I will throw up the argument." Indeed the whole stress of his attack rests on the effect of enclosures on the poor, and he ridicules hedging and ditching as providing any permanent remedy.

From about 1760 a great current in favour of enclosures sets in and a vast number of tracts are published, chiefly in favour of such proceedings. In their support are urged the great profit to be obtained in increased rent and produce, and the worthlessness of wastes and commons left open. The chief arguments against are the damage to the poor and the depopulation of enclosed parishes. As a consequence, or as another sign of the same movement of feeling, a large number of Private Inclosure Acts were passed; and the tendency to enclose was strengthened by the action and reports of the General Board of Agriculture in the years following 1793.

In that year the establishment of such a Board was proposed to Parliament by Sir John Sinclair and, the project meeting with approval, the Board was incorporated on August 23, 1793, Sir John Sinclair being the first President, and Arthur Young the first Secretary. The Board had as its objects to collect facts as to the condition of agriculture, to make experiments, and generally to encourage agriculture[1]. It commenced by sending out a series of queries to farmers throughout the country, and by appointing reporters to draw

[1] A set of papers relating to the early years of the Board, and reports of its reporters, kept by Sir J. Banks, one of its members, is in the British Museum.

up accounts of the agriculture of each county. The king, in his capacity of the "Royal Farmer", took great interest in the Board and considered the questions they sent out. Those questions included several bearing on the condition of common fields and wastes:—e.g.:—"13. Is the land inclosed or in open fields? 14. What advantages have been found to result from inclosing land in respect to the increase of rent, quantity or quality of produce, improvement of stock? 15. What is the size and value of the inclosures? 16. Whether inclosures have increased or decreased population? 17. Whether there are any common fields and whether any division of them is proposed? 18. What is the extent of waste lands; in what manner are they at present depastured? 19. Of what improvements are those waste lands capable, whether by being planted, converted into arable or pasture land, or by correcting the present mode of commonage"?

The reports received provide a most valuable mass of information as to the state of agriculture in Great Britain; and as Arthur Young says in a lecture before the Royal Society in 1809, they contain "a detail of inclosures, whether by private exertion or by public authority, and the consequences which have flowed from them." Side by side with this obtaining of information a Committee was appointed "to take the present state of the waste lands and common fields of the kingdom and the probable means of their improvement under their consideration and to report the same to the Board". To that Committee in 1794, Mr Robinson, the Surveyor General of Woods and Forests, presented a valuable memorandum of the old law, and in January, 1795, the Committee reported.

As to common fields we have already dealt with the contents of the Reports; the system is almost universally condemned and the profit from enclosures in the increased yield and rent of the land is spoken of as very great.

In Bucks enclosures give double the rent of common fields[1]. At Weston Colville in Cambridgeshire farmers were living comfortably on enclosed land rented at 10*s.* 6*d.* an acre, on

[1] Bucks, Rep. p. 29.

which, when it lay open, the former tenant had starved at a rent of 2*s.* 6*d.* an acre[1]. At Maypole a fen, which before its drainage and enclosure let at 1*s.* per acre, after those processes brought in 45*s.* per acre. In Leicestershire enclosing the open fields had advanced rents from 8*s.* to 20*s.*[2] At Queenborough in that county the lands before enclosing had let at 2*s.* 6*d.* an acre, but an offer was now made to enclose them bearing the expense of the enclosure and to pay 25*s.* a year per acre on a 21 years' lease. At South Mimms in Middlesex, the open fields were raised in rent from 2*s.* to 15*s.* an acre by enclosing. Arthur Young's detailed report on enclosures in Norfolk says that all the enclosures have largely increased both rents and the produce of the land in corn, and have much improved the breed of sheep and cows; and there is a great mass of similar testimony.

But while the common fields are condemned as a system of arable land, the wastes and common pastures fall under the most severe judgment. The Secretary of the Board very early in his career had attacked them, and in 1773 had published "Observations on the present State of Waste Lands of Great Britain", in which he had lamented the great extent of land lying waste; a line could be drawn from the northern portion of Derbyshire to the end of Northumberland which would pass entirely across waste lands; and he makes a suggestion which when revived in the present day met with universal ridicule. He bewails the extensive estates formed by buying up wastes by the neighbouring owners, "not with a view to cultivate them, but for the increase of their domain, for elbow room, for hunting ground, for moor game...we have", he says, "the wastes, but they are too often in hands that either will not hear of improvements, or not offer proper encouragement to settlers...Would to heaven an Act passed to oblige the possessors to sell them, if not in culture by such a time, and the new purchasers to begin the work of gaining them immediately"; and he suggests that Government or a private Company should embark in the labour.

[1] Camb. p. 24. [2] Leicester, p. 45.

The Reports to the Board are couched in the same strain. The Committee on Inclosures find that there are over 22 million acres of land lying waste in the United Kingdom, and with one voice the reporters urge the agricultural, economical and social advantages to the nation that would result from the enclosure of such land[1]. From the first these commons had been the home of squatters of no very good character. Nordon in 1602[2] had written: "It is observed in some parts where I have travelled where great and spacious wastes, mountains woods forests and heaths are, that many cottages are set up, the people given to little or no kind of labour, living very hardly with oaten bread and sour whey and goat's milk, dwelling far from any church or chapel, and are as ignorant of God or of any civil course of life as the very savages among the infidels, in a manner which is lamentable and fit to be reformed by the lord of the manor." In the Hertford Report we read: "where wastes and commons are most extensive there the cottagers are most wretched, accustomed to rely on a precarious and vagabond subsistence they fall to pilfering." The Gloucestershire reporter says: "The wastes in their present state are not only of very little real utility, but are productive of one very great nuisance, that of the erection of cottages by idle and dissolute people, sometimes from the neighbourhood, and sometimes strangers. Their chief building materials are storepoles stolen from the neighbouring woods. These cottages are seldom or never the abode of honest industry, but serve for harbour for poachers and thieves of all descriptions." In most of the forests there were many encroachments by poor squatters. In Shropshire we hear of "the miserable huts in poor impoverished spots on the common now erected or rather thrown together and enclosed by themselves for which they pay 6*d.* or 1*s.* a year, within wastes and lanes, which in 20 years become the property of the lords of the manor"; and the reporter speaks of the indolence and immorality of the inhabitants. The Essex reporter has a passage which shows remarkably how the spirit of the time has changed. The forests of Epping and Hainault,

[1] England, 6,259,470 acres.
Wales, 1,629,307 ,,
Scotland 14,218,224 acres.

[2] *Surveyor's Dialogue*, p. 22.

he says, "are viewed as an intolerable nuisance; at Chigwell and Loughton the farmers uniformly declare that the privilege of commonage is not equal to one tenth of the losses they sustain from the deer in breaking down their fences, trespassing in their fields, and destroying their crops ripe and green. The forests, so near the metropolis, are well known to be a resort of the most idle and profligate of men; here the undergraduates in iniquity commence their career with deer stealing, and here the more finished and hardened robber retires from justice[1]." This is curious reading to day, when the "intolerable nuisance" of the forest of Epping has been preserved to the people for ever by Act of Parliament.

The reporters view all the wastes from a commercial standpoint and from the point of view of a protectionist country wishing to live on its own resources. It would be, they say, to the public benefit to extinguish the rights of common on Dartmoor; "which are a nuisance rather than a benefit, through the expense and losses of sheep", and Mr Justice Buller is endeavouring as a resident to enclose it. Something is indeed being effected by the operation of the custom which allows the purchasers of any ancient inclosure to inclose 30 acres of common, called a "*new-take*"; but more vigorous measures are needed. The Forest of Dean might be converted to agriculture with great advantage to the nation. The New Forest is much encroached upon and overstocked with deer and rabbits, and the reporter suggests that the Crown in return for surrendering certain privileges, including the deer, should have leave to enclose 20,000 acres for timber, instead of the paltry 6000 acres it could then by law fence in. As to Hounslow Heath, Finchley Common, and Enfield Chase, the reporter fervently hopes that "the time is not far distant, when such wastes shall no longer remain a disgrace to the country." For now they are "as if they belonged to Cherokees." The enclosure of Exmoor "would lessen the poor rates and train the rising generations to care and industry, instead of to theft and idleness." The Surrey reporter is loud in his complaints; Kennington

[1] Vancouver, *Essex*, p. 110.

Common by building leases might produce a considerable revenue; it is "much to be lamented that Epsom Common should be so unprofitable[1]." As to Wimbledon and Putney, it is "surprising they should remain in their present uncultivated state." The country is deprived of so much corn, the poor of so much employment. But Cobham Common is being enclosed, and 20 acres thereof sold for £1260, "which will prove to lords of the manor how valuable these commons are." Banstead Downs are to be enclosed[2]. There is only one passage which shows any trace of the modern view that commons are the lungs of great towns, and moors and mountains the restorers of health to the nation. The Middlesex reporter thinks that "the inclosure of some commons near London would be objected to, as tending to prevent that free circulation of air so conducive to the health of the inhabitants, and to shut up places calculated for the recreation and amusement of themselves and families." "These objections", says the reporter with delightful humour, "though they have at first some appearance of weight, yet are easily obviated" by a plan in which, after the commons have been enclosed and part of them let on building leases, the tenant of the enclosed pasture is to be bound to keep cows for the supply of milk to the poor, and to provide the poor commoners with fuel, while the rent of this pasture is to be divided amongst the commoners. Public opinion has certainly advanced since the Middlesex reporter "easily obviated the objections" to the enclosure of metropolitan commons by a scheme like this.

The Reports and advice of the Board of Agriculture certainly led to increased enclosure, though the Secretary half indignantly complained that one member of Parliament had said to him: "I know nothing you have done but bring meat to market so fat that nobody can eat it." In the 16 years before the Board was established (1777—1793), 599 Inclosure Acts were passed: in the 16 years following, the number had risen to 1052; and in the Session of 1809, 152 petitions for enclosures were laid before Parliament[3]. Arthur Young with justice

[1] The proposed enclosure of this common was much discussed before the Committee of 1865.

[2] Fortunately they survived this, and a quite recent attack.

[3] Lecture to Royal Society, 1809.

attributes the increase largely to the spirit of improvement excited by the Board, and to the legislative facilities, hereafter to be alluded to, which it was the means of procuring: yet even at that rate of progress he laments that it will take a hundred years to enclose the wastes of England, the idea of a Commons Preservation Society being beyond his mental grasp.

The process of Inclosure by Private Acts was fraught with inconveniences and had in many cases unfortunate results. The consents of a large majority, four-fifths, of the persons having common rights, of the lord, and of the person entitled to the tithes, were necessary to induce Parliament to sanction the enclosure. Anyone of these classes could defeat the measure, and their interests were antagonistic. The smaller commoners were reluctant to give up their lazy life, dependent on the cattle they reared on the common, for one of settled industry. The small freeholder, as his expenses of enclosure were proportionately greater than that of any other class, was not anxious to enclose. Those who lived near the common, and enjoyed the full advantage of it, the "one in ten, who took ten times his share[1]", naturally objected to a measure which placed them on an equality with more distant tenants. As the Gloucestershire reporter says: "A common is principally serviceable to those only who reside near it, and who can therefore have an opportunity daily of seeing their stock on it. Persons of this class...throw cold water on every scheme to inclose as it appears to lessen their own advantages by making others joint partakers with them." In Enfield Chase[2]: "so much attached are the cottagers to their idle system of keeping a few half-starved cattle on the Chase...that they constantly oppose any inclosure."

As had been the case in the 17th century, so now the commoners in the fens were specially turbulent. When in 1768 Holland Fen in Lincolnshire was enclosed, the neighbouring inhabitants pulled down during the night the fences erected in the day; the chief commissioner of the enclosure was shot at;

[1] Bucks Report, p. 36. [2] Herts, p. 26.

and many riots and much bloodshed took place[1]. But "many who had used every effort to oppose the enclosure lived afterwards to see their folly. One man, who had gained only a scanty subsistence by fishing and fowling, and whose character was not of the first rate for respectability, after the enclosure had taken place rented land and died possessed of £20,000, having been for years respected by all who knew him." So in Somerset, the enclosures of Brent Marsh and Sedgemoor Fen were for a long time stopped by the opposition of the commoners. The schemes were highly unpopular; and their first promoters all but fell a sacrifice to popular fury and resentment though the results of the enclosure falsified their prediction[2]. "Scarcely a farmer can now be found", says the Somerset reporter, "who does not possess a considerable landed property, and many whose fathers lived in sloth and idleness on the precarious support of a few half-starved cows or limping geese, are now in affluence."

Where the majority of the commoners were satisfied, the consent of the lord of the manor might be absent, and the scheme might be wrecked. In one Yorkshire township[3], where two-thirds of the freeholders in number and in value desired an enclosure of their common of 12,800 acres, 4800 acres of which were capable of very great improvement, and had agreed with the tithe owners, and signed a Petition to Parliament, the lord of the manor, who possessed very little other property there, was determined to oppose it, and the business was dropped from an apprehension of the expense and trouble attending an opposition in Parliament.

Tithes were even a more serious obstacle; the tenants were not anxious to spend money, that the tithe owners who had contributed nothing to the improvement might immediately claim their tithe of the increased profits; the tithe owners were not anxious to take their tenth of the lands enclosed as a commutation, having to enclose and to till them at their own expense. At Tyd St Giles, in Cambridgeshire, the fens were reclaimed at a cost of £10,000, and when the land was in corn, the rector, who had contributed nothing to the expense, at once

[1] Allen's *Lincolnshire*, I. 350.

[2] Somerset Report, pp. 95, 131.

[3] North Riding Report. Marshall, p. 201.

stepped in to claim the tithe. At Froxfield Barnet in Hampshire the parishioners wished to enclose, but the lord of the manor, who also held the great tithes, refused to accept an allotment of land in lieu of them, and for that reason the enclosure was dropped. The tenants being favourable to the commutation of tithes, which gave them their enclosures tithe-free, several of the reporters press for a General Inclosure Bill, which should so define the claim of lords of manors and owners of tithes "that their simple opposition should not hang *in terrorem* on the very threshold of an inclosure[1]." But this attitude brought on the Board of Agriculture the suspicions of a Parliament which boasted itself the Defender of the Church; and several of the Board's proposals were rejected "under an unaccountable suspicion that the Board and its President were hostile to the Church[2]."

A still more serious difficulty was to be found in the expense attending the passing of a private Inclosure Act through Parliament, especially if opposed. Each Inclosure Act was a little system of patronage, being frequently smuggled through in the interest of the larger parishioners; the appointments of solicitor, clerk, valuer, commissioners, &c. were all bestowed by the lords, rector and principal parishioners for local reasons, and without economy. Then came the London expenses, and journeys of witnesses to London. By the rules of Parliament, an Act enclosing a waste over which several parishes had common rights had to pay as many sets of fees as there were parishes; and, to take an extreme case, an Act for the enclosing the East and West Fens in Lincolnshire, on which 47 parishes commoned, would have to pay 47 sets of fees. In a township in the North Riding 250 acres of land were enclosed; and the Act, which was unopposed, cost the proprietors £370; a figure which was seldom diminished. In two parishes of Somerset, the cost of enclosing a fen parish was £2485, of which the Act cost £500; while an upland parish was enclosed for £1951, of which the Act stood for £300. The delay and uncertainty in getting such bills through the House had a very injurious effect

[1] Yorkshire, West Riding. Society, 1809.

[2] Arthur Young's Lecture, Royal

on farming in the parish during the time the enclosure was in contemplation, as men would not lay out money and labour till they knew their exact interest in the land. In favour of the continuance of this system were the large number of officials who lived by it. As one of the contributors to the Reports sarcastically remarks:—"What would become of the poor but honest attorney, officers of Parliament and a long train of &c. &c. who obtain a decent livelihood from the trifling fees of every individual inclosure Bill? The waste lands in the dribbling difficult way in which they are at present inclosed will cost the country upwards of 20 millions to these gentry, which under a general inclosure Bill would be done for less than one million."

The system in its results was open to many complaints. Sometimes through ignorance unsuitable lands were broken up for tillage, or suitable lands were exhausted by repeated croppings: as the reporter for the East Riding says:—"Either from the proprietor's want of knowledge or reflexion on the nature and situation of the land, or from the sinister views and endeavours of a solicitor, and from the train of jobs which inclosures when ill-conducted needlessly create, much land in the wolds has been inclosed which might have been with more advantage left open." These evils however were infrequent and not essential to enclosures. Two other complaints made against them are more constant and serious. It is said that they depopulated parishes; and that they injured the poor.

The objection that enclosures depopulated parishes and turned their inhabitants adrift in the world was, as we have seen, no new thing. It had been the great burden of the complaints of writers under the Tudors, it was constantly urged by the opponents of enclosures under the Georges. But it was an objection capable of being brought to the test of statistical verification by anyone with sufficient energy and patience. The Reverend Mr Howlett compared the growth of 89 enclosed parishes and 490 open parishes for two periods of 5 years each, with the following results[1]:—

[1] *Inquiry into the Influence of Inclosures on Population.* Lond. 1786.

	89 enclosed parishes	450 open parishes
1760—1765	10,804 baptisms	52,731 baptisms
1775—1780	13,138 „	57,984 „
	being an increase from 100 to 121	being an increase from 100 to 109

The Bucks reporter says it is admitted that the population in parishes in that county enclosed within 25 years has increased. Of Wimpole the Cambridgeshire reporter says the same; while the fen enclosures undoubtedly increase population; cottages are built there and filled with families. Out of 37 enclosed parishes in Norfolk as to which Arthur Young obtained information, he found that since their enclosure population had increased in 24, decreased in 8, and remained stationary in 5. Felbrigg in Norfolk had never before 1771, in which year it was enclosed, exceeded in population 124, which number it reached in 1745; but in 1793 it had a population of 174, while Wyburn, a neighbouring and unenclosed village, had remained stationary. Between 1757 and 1772 much of Lincolnshire was enclosed but its population increased[1]. On the other hand it is certain that in some cases a decrease of population followed enclosure, though the loss was often capable of explanation. Thus in Hevening-ham in Norfolk, the decrease appeared to be due to the fact that a new parish workhouse and the loss of the common had made the town a much less desirable residence for the idle poor. It was true that the rate of increase of population in some enclosed parishes was not so rapid as that in neighbouring open parishes, but this was hardly an evil. Enclosures which turned tillage into pasture undoubtedly tended to decrease population; those which preserved land in tillage at any rate did not decrease it, whilst the reclamation and enclosure of fens and wastes often led to a great increase of inhabitants.

The effect of enclosures on the condition of the poor was

[1] *Advantages and Disadvantages of Inclosing.* Lond. 1772.

more serious. In 1652 the author of *The Common Good*[1] had complained that enclosures were "the undoing of the poor, who lose cows' feed, keeping of sheep, and brushes for fuel", and had expressed the fear that the lord of the manor would be enriched at the expense of his tenants. Many of the poor who had been in the habit of keeping stock on the common could not strictly prove a legal right to common and received no allotment in the enclosure; this however was not always the case, for Arthur Young says in the Norfolk report:—"In all the inclosures for which Mr Algar has been commissioner it has not been the practice to make the poor prove the legality of their claims, but only that they had exercised such powers, and a practice even of cutting turf was considered a right of common." Those who did receive an allotment often found it insufficient for the keep of the cow in summer and winter, and were forced to sell their cow and lose its milk. Sometimes the allotment was made not to the occupier of a cottage, but to its owner[2], by which means the poor lost any benefit from it; and frequently the cottager sold his little plot, before even it was enclosed, to a large owner in the parish.

Of the evils that resulted from enclosures when the condition of the poor was not considered there is abundance of evidence. Out of 37 parishes as to which Young had information of the condition of their poor, in only 12 were they not injured by enclosure[3]. Mr Forster of Norwich, who had been commissioner for 20 enclosures, said:—"They injure the poor. Numbers in the practice of feeding the commons cannot prove their rights, and most who have allotments have not more than an acre, which being insufficient for the man's cow, both cow and land are usually sold to the opulent farmers; the price is dissipated, doing them no good when they cannot expend it in stock." Mr Ewen, another commissioner, thought that "in most of the inclosures the poor man's allotment and cow are sold five times out of six before the award is made." Some enclosure awards made provision for these objections; in Saxham enclosure every man who proved he had been in the habit of keeping stock on

[1] p. 7.

[2] e.g. Ludham in Norfolk.

[3] Arthur Young, *on Wastes*, 1801: p. 25.

the common, whether with or without right, had an allotment. In the Northwold award, the allotments were made inalienable from the cottages, though the good effect of this was injured by the fact that the allotments were 4½ miles from the cottages. In many enclosures the cows in the parish had been much diminished. Of 50 parishes as to which Young had information[1], the cows had increased in 20, had kept about the same number in 12, and had decreased in 18, since their enclosure. Sir J. Sinclair's General Report on Inclosures in 1808 is full of entries like these:—

"*Tutny, Bedfordshire:* Before the enclosure the poor inhabitants found no difficulty in procuring milk for their children; since it is with the utmost difficulty that they can get any milk at all. Cows lessened from 110 to 40.

Tingewick, Bucks: Milk to be had at a penny a quart before, now not at any price.

Dorrington, Lincolnshire: Cottagers' cows (140) lost by enclosure.

Uffington, Lincolnshire: Town herd of cows reduced one-third to the great injury of the poor.

Shottesham, Norfolk: Cottagers' cows much decreased.

Ebberston, York: Cottagers have lost their cows.

Lanchester, Durham: Milk has diminished owing to the farmers finding the profits of grazing larger, and the unwillingness of too many agents and proprietors to accommodate industrious cottagers with small parcels of land to keep a cow, &c."

Arthur Young records the same results[2]. At Alconbury the enclosure was highly injurious to the poor. Many kept cows that had not done so since; they could not bear the expense of enclosing their allotment and sold it; other allotments belonging to the landlord were hired by strangers and the poor left without cows or land. At Shouldham the effect of the enclosure was to prevent the poor from keeping live stock, and to reduce

[1] Young's Norfolk Report.

[2] A. Young. "Inquiry into the propriety of applying the wastes to the better maintenance and support of the Poor; being the substance of notes taken in a tour in the year 1800."—Norfolk Report, by same author.

their 40 cows to two; while at Garboisethorpe, the 20 cows of the poor had entirely disappeared.

Indeed while none of the reporters, in their enthusiasm for enclosure and reclamation of the wastes, admit that the poor necessarily suffer, many of them complain that enclosures may be and have been so managed as to harm the poor. The cry of "Three acres and a cow", the revolutionary novelty of which lately alarmed the landed interest, has quite a respectable antiquity. So early as 1540 Thomas Beacon had regretted that "the poor people were not able to keep a cow for the comfort of themselves and their poor family[1]." In 1772 an anonymous writer suggests that landlords should lay to their cottages "a sufficient proportion of land to keep a cow or two[2]." The Bucks reporter says: "Let every industrious poor man have sufficiency of land to keep a cow": the reporter for Bedfordshire agrees. His Norfolk colleague thinks that the labourer should have a cow or a pig with a little land at a moderate rent, which gives him a stake in the country, and makes him sober and steady. The Rutland writer reports that in his county there are many cottagers with land enough for one or two cows, they working as day labourers; that such parishes have low poor-rates, and the land is valued and made the most of by the cottagers; while Arthur Young very nearly specifies the amount of land afterwards so notorious, when in 1801 he says: "There is considerable benefit in the poor people having land enough for a cow, from two to four acres according to the soil."

In the parishes where land enough for a cow or two was not left to the poor, the enclosure was mischievous in its effects on them. They could not keep their stock; they sold cows and small allotments to the large farmers, and were reduced to the position of labourers at the mercy of the farmers and with no hope of ever rising from their precarious position. False economy in withholding grants of land from the poor proved true extravagance in the high poor-rates it caused. Parishes paid in poor-rates sums which would have established all their poor on plots of land sufficient to maintain them without parish relief.

[1] *Jewels of Joy.*

[2] *Advantages and Disadvantages of Enclosing.*"

"Go to an alehouse kitchen", says Arthur Young[1], "and there you shall see the origin of poverty and poor-rates. For whom are they to be sober? For whom are they to save? (such are their questions). For the parish? If I am diligent shall I have leave to build a cottage? If I am sober shall I have land for a cow? If I am frugal shall I have half an acre of potatoes? You offer no motives; you have nothing but a parish officer and a workhouse. Bring me another pot!"

This was the result in enclosures managed so as to take away from the poor all interest or hope of interest in the soil, conducted in the spirit of the Essex reporter, who suggests a general Act to enable the lord to purchase the common rights, allotments being undesirable, "as they may fall into undesirable hands." On the other hand, from allotments of common or waste of sufficient size and inalienable from the cottages the best results followed. They were unpopular with the owners of land entitled to common rights, but popular with the poor; and they kept down the poor-rates. In one parish in Worcestershire the lord of the whole parish allotted to each of the cottages from 5 to 12 acres at a moderate rent and lent them money to find stock. The plan was very successful; the poor-rate was fourpence as against rates from 2*s.* 6*d.* to 5*s.* in neighbouring parishes: and the land thus allotted was doubled in value. At Nazing in Essex the common rights were regulated by Act of Parliament. The poor were remarkably idle and dissolute, but a gentleman in the parish offered to advance money to every poor man who could not afford to buy live stock, and many accepted his offer. They were converted by this property into "as sober and regular a people as they were before licentious." In Lincolnshire in 48 parishes, 753 labourers and their families, renting land sufficient for one or two cows, received nothing from the parish in any of the periods of scarcity, and their interest in the land kept them frugal and industrious. In the parish of Blofield in Norfolk there were 260 poor, 150 of whom had squatted on the common, enclosing 40 acres, and keeping 23 cows and 18 horses; the poor-rate paid to the 150 squatters

[1] *Inquiry into Wastes.*

was £24, to the 110 others £150. In the same county Young makes entries:—"*Buckenham:* the poor had allotted to them 100 acres of land for fuel, double portions of land; nobody suffered or complained.

Burnham Norton:—the poor kept 17 cows on the common; the farmers sold them hay and straw; well contented and well off.

Felthorpe: 25 small occupiers, generally owners; comfortable; work harder than day labourers.

Heacham: 12 or 15 little and very comfortable proprietors, from 2 to 10 acres, who have cows and some corn. I wish it was universal.

Shottesham: 60 acres out of 300 allotted to poor; all poor might keep a cow; inclosure very beneficial."

The Northumberland reporter advises that "land should be given instead of money to all who had common rights, that they might be induced to build small cottages on their own property." Even where the cottagers had no cows but had the right to keep them they valued the right and looked forward to buying one.

The Hertfordshire reporter suggested, to meet this general objection, that the consent of three-fourths of the cottagers should be required to any enclosure; and the Committee on Inclosures in 1794 reported: "If a general Bill for improvement of waste lands was passed, care must be taken that the rights of the poor should be as much attended to and as well protected as those of the rich. As inclosures will, it is hoped, in future be made at much less expense than before, the poor evidently stand a better chance of getting their full share undiminished." The allusion is to the need for a general Inclosure Bill; and to the legislative provisions for facilitating or supervising enclosures we now therefore turn.

CHAPTER VII.

The Policy of Open Spaces: Modern Legislation.

The Legislature during the present century has provided at first abundant statutory provisions for enclosures, and afterwards statutory protection for open spaces, especially in the neighbourhood of towns. The statutes, which are very numerous, are dealt with fully in works already existing[1]; and it will be sufficient here to indicate the general policy of the Legislature and the chief steps which it took to carry out that policy.

Temporary enclosures for certain national purposes had already been sanctioned by Parliament; the growth of timber had very early in our history received legislative protection[2], and Acts of 1756 and 1758 allowed lords of wastes or owners of common fields, with the assent of the major part in number and value of the commoners, to enclose wastes or common fields in severalty for the growth or preservation of timber for such time, in such manner and upon such conditions as should be agreed[3]. But these statutes were not very effective. Mr Robinson, an official of the department of Woods and Forests, reports to the Board of Agriculture in 1794 that some enclosures have been made under the statutes for planting, but only small tracts... "they have been but of trifling use, more indeed for pleasure and convenience than for essential advantage in planting, the difficulty of obtaining consent from the major part in number

[1] Joshua Williams, *On Rights of Commons;* Elton, *On Commons and Waste Lands;* Woolrych, *On Rights of Common;* Chitty's Statutes, sub voce Inclosures.

[2] 22 Ed. IV. c. 7; 35 Hen. VIII. c. 17.

[3] 29 Geo. II. c. 36, § 1; 31 Geo. II. c. 41.

and value of the persons interested being almost insuperable, every small cottager counting equal with persons of large estates."

An Act of 1713[1] allowed lords of manors and freeholders in manors in the West Riding to enclose under certain conditions not more than 60 acres, or one-sixth of the waste of the manor, whichever should be least, for the support of poor ministers. The Poor Law of Elizabeth had allowed the churchwardens with the consent of the lord of the manor to build upon the wastes of the manor houses for the impotent poor[2]; and statutory facilities were also given for enclosing wastes or common lands for the purpose of erecting churches, making churchyards, or building schools. These facilities were to be used by the lord of the manor, whose grant was to discharge all common rights in the land[3]. These however were Acts promoting enclosures only for special objects or in particular localities.

In 1773 a dearth of corn among other things[4] called the attention of the Legislature to the condition of the common fields and wastes, and produced an Act "for the better cultivation, improvement and regulation of the common arable fields, wastes and commons of pasture in the Kingdom[5]." Under this Act the cultivation of open or common fields might be changed or regulated by the ordinance of three-fourths in number and value of the occupiers of such lands, the consent of the landowners and of the rector or tithe-owner being also obtained. The regulations might keep the common fields enclosed, stint the commons, or, with the consent of the lord of the manor, "balks slades or meers lying very inconveniently interspersed among the arable lands in common fields" might be ploughed up; and a field reeve was to be appointed to enforce the regulations. The arrangement was however only to last for six years. Cottagers who had no land were not to be deprived of their rights of common; and any dissenting minority were to have a portion of the common set aside for their use, free from the regulations. The lord of the manor, with the consent of

[1] 12 Anne, c. 4.
[2] 43 Eliz. c. 2.
[3] 51 Geo. III. c. 115, § 2; 58 Geo. III. c. 45, § 38; 4 & 5 Vic. c. 38, § 2.
[4] *Vide* ante, p. 136.
[5] 13 Geo. III. c. 81.

three-fourths of those having rights of common, had power to lease not more than a twelfth part of the waste for not more than four years, the rent being employed in draining, fencing and otherwise improving the rest of the waste. Several contemporary writers, especially the Oxfordshire reporter, regret that so little use was made of this Act.

The Reports of the Board of Agriculture, as has been seen[1], are full of complaints of the difficulties thrown in the way of enclosing by the complicated nature of the legal machinery, and of recommendations in favour of a general Inclosure Act. "A well-digested general Bill for the inclosure of commons, common fields and waste lands", says the Bedfordshire reporter, "would wonderfully operate towards the success of inclosures, as it would be a means of saving a very considerable expense at the outset of the business." The Yorkshire reporter remarks that "no real improvement can take place in the common fields or wastes without a previous division; and without a general law being passed at once for the whole kingdom; their divisions according to the present system will never be accomplished." The Gloucestershire reporter both recommends the general Bill and shows the features which made some enclosures so unpopular when he says:—"The best step would be to have one general Act, ascertaining the proportions according to each freeholder's separate property, and then leaving it to each parish where there were wastes to inclose or not. Speculative men would then soon buy up the smaller shares and there would be ample scope for industry, whereas now in a litigated bill for inclosures no man can predict the expense or even success." This buying up of the smaller shares, and extinguishing the small landowners was foreseen and even justified; as when one writer "doubts it is too true that the small farmer must of necessity give over farming, and betake himself to labour...but the condition of a small farmer is very often worse than even that of a day labourer." The movement for enclosure proceeded, as the Durham reporter said, "from the frequent and fervent wish of the proprietors and more intelligent farmers for some general law or process of light expense for the division of uninclosed land."

[1] Ante, pp. 142—145.

The Report of the Committee of the Board of Agriculture in 1794 accordingly suggested a general Bill for enclosures, by which the process of enclosing might be made as cheap and as certain as possible, all proceedings taking place on the spot, and the consent of two-thirds, or even one-half, of the persons interested sufficing. The Board approached Parliament through their president Sir J. Sinclair, but opposition from various quarters rendered their task by no means easy. Their first Bill was thrown out; "the obstacles being aggravated", says Arthur Young[1], "in no slight degree by efforts of private interest", and the Bill "proved the origin of no small share of obloquy to the Board." On the occasion of a great dearth and scarcity the Bill was revived and passed the Commons, but was thrown out in the House of Lords, "under an unaccountable prejudice that the Board and its president were hostile to the church", which seems to have arisen from its proposal to commute the tithes[2]. In a subsequent session resolutions of the House of Commons lessened the expense of enclosure; and in 1801 the efforts of the Board were partially successful and the first general Act of Inclosure was passed, being "an Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure, and for facilitating the mode of proving the several facts usually required in the passing of such Acts[3]." In 44 clauses a number of provisions usually inserted in each private Act are made to apply to all enclosures, in the absence of express provision to the contrary. The machinery and the expense of an application to Parliament for a private Act still continued, and the fight was still before a Parliamentary committee; but the private Act became much shorter, owing to the number of provisions enacted once for all in the general Act. The result was to render enclosure easier and the process of enclosing less onerous and expensive.

But the statute was rather addressed to the enclosure of commons and wastes than to dealing with the common fields[4]. In 1834 an Act was passed "to facilitate the exchange of pieces

[1] Lecture before Royal Society, May, 1809.

[2] Ante, p. 144.

[3] 41 Geo. III. c. 109.

[4] Woolrych, p. 318.

of land lying intermixed and dispersed in common fields, meadows or pastures, for other pieces of land either lying therein or being part of the inclosed lands in the same or any adjoining parish[1]": but though this allowed the consolidation of holdings it did nothing towards assisting the enclosure of the open fields. Accordingly in 1836 an Act "for facilitating the inclosure of open and arable fields in England and Wales[2]" was introduced into the Commons, and passed that House with little if any discussion. Some interest however was taken in enclosures, for on May 18, the third reading of the Over (Cambridgeshire) Inclosure Bill coming on[3], its rejection was moved by Doctor Bowring, as "another encroachment on the remaining rights and privileges of the poor", who were said to be unanimously opposed to it. It was urged that the poor could have allotments worth more than their rights of common, and that the only opposition to the Bill proceeded from two cattle-jobbers, who were in the habit of turning 200 or 300 cattle on the common at a time to the injury of the poor inhabitants. But the vigorous language of Mr Hume, who said the Bill would deprive the poor of the right of feeding their cattle and sheep and was a downright robbery, prevailed, and the Over Bill was thrown out by a majority of four. The general Bill, however, excited no discussion till it reached the Lords; there some opposition arose from the misunderstanding that the Bill dealt with wastes and commons, and hopes were expressed that the wastes near large towns would be preserved for the comfort and benefit of their inhabitants[4]. Lord Holland said:—"It had been matter of surprise to all foreigners and indeed a reproach to this country that though its laws and institutions were formed on proper and liberal grounds, yet there were no places provided suitable for the healthy exercise and recreation of the people[5]." Lord Ellenborough agreed:—"It was extremely desirable that the people should have some open spaces to which they might resort for healthy recreation. It was much better for them to have such places left open to them, than to be shut out and

[1] 4 & 5 Will. IV. c. 30.
[2] 6 & 7 Will. IV. c. 115.
[3] Hansard, 33, 1064.
[4] Hansard, 35, 1026.
[5] *Ibid.* 1226.

left no other resource than the alehouse." When the Bill returned to the Commons it was attacked by members, who confounded commons with common fields, as "materially affecting the rights and enjoyments of the people[1]", but the opposition was small, and the bill passed. By its provisions, two-thirds in number and value of the possessors of any rights in common fields might nominate commissioners[2] and carry out an enclosure of the common fields: the course of husbandry till the enclosure was completed to be directed by the Commissioners: the Act also authorised exchanges[3]. The Act was not to apply to any waste lands or to manorial rights, but only to common fields[4]; and no open or common fields were to be enclosed under it within 10 miles of London, or within a smaller distance, varying with the population, of any town of above 5000 people[5]. By a further Act of 1840 the award of these Commissioners was made final, and the former Act was extended to Lammas lands, as lands only commonable during part of the year[6].

The convenience of this method, contrasted with the expenses of enclosing wastes, led to its extension to the waste lands of the kingdom, and the General Inclosure Act of 1845 was accordingly passed[7]. A private measure of similar purport had been introduced by Lord Worsley in the previous session and referred to a committee, which after examining a large number of witnesses from all parts of the country reported strongly in favour of a general measure for facilitating enclosures, and the appointment of a Commission for that purpose. In expectation of such a Bill all private legislation had been suspended for two or three years. The Bill as passed appointed an Inclosure Commission to deal with Inclosures. The lands that might be enclosed under the Act were divided into three classes:—(1) those that might be enclosed without previous direction or intervention of Parliament; including all open

[1] Hansard, 35, 1271.

[2] Seven-eighths in number and value could bring about an enclosure without the intervention of commissioners, §§ 40—44, 53.

[3] § 35.

[4] § 54.

[5] § 55. A precedent had been set for this in the Act of Elizabeth already referred to (p. 95, 35 Eliz. c. 6), forbidding enclosures within three miles of London.

[6] 3 & 4 Vic. c. 31.

[7] 8 & 9 Vic. c. 118.

lands held in severalty where no rights of common or rights of an indefinite nature existed:—(2) lands that could not be enclosed by the commissioners without the previous sanction of Parliament, including all lands over which rights of common existed, all gated and stinted pastures, pastures without stint, and waste lands of manors over which the tenants had common; and also all wastes within 15 miles of London, or within distances from other large towns varying according to their inhabitants, but greater than in the Act of 1836:—(3) there were excluded from the operation of this Act all town greens and village greens; and all lands in the New Forest and Forest of Dean.

The method of enclosure was an inquiry by the Inclosure Commissioners, who, if they were satisfied of the expediency of the enclosure, drew up a scheme: all the schemes for the year were submitted to Parliament in one general Act. This change of tribunal from the Parliamentary Committee to the Commissioners supervised by Parliament was intended by those who introduced the Act to protect the rights of the poorer commoners. "It appears to me", said the Earl of Lincoln in introducing the Bill in the House of Commons[1], "that the Commission will be better calculated to protect the rights of the poor than any practice of private legislation and examination before committees of this House. It is often impossible for the poor man to defend his own rights as effectively as I think the Commissioners would. This I know, that in 19 cases out of 20, Committees of this House, sitting on private Bills, neglected the rights of the poor. I do not say that they wilfully neglected those rights; far from it; but this I affirm, that they were neglected in consequence of the Committee's being permitted to remain in ignorance of the claims of the poor man, because by reason of his very poverty he is unable to come up to London, to fee counsel, to produce witnesses, and to urge his claims before a Committee of this House. A Commission may be so constituted as to afford to the poor man by examination on the spot and at his own door more certain security than any system of private legislation." In the same spirit, while village greens might not

[1] Hansard, 80, 25.

be enclosed[1], the Commissioners were to have power to drain, regulate and preserve them, "having power to do all that is necessary for making these places of healthful and harmless recreation available for the uses of the poor[2]." Power was also given to the Commissioners to set out land for places of exercise and recreation for the inhabitants of the neighbourhood, or for field gardens, at a fair rent, for the labouring poor[3]; as to which the Earl of Lincoln pointed out that the field gardens must be near their dwellings to have any beneficial effect on the condition of the poor. The Commissioners had therefore power to alter into a more convenient situation land allotted to the poor under any previous Act, if other landowners were willing to exchange[4]: and they might refuse to enclose unless an allotment of a certain specified size was set apart for exercise and recreation and for the labouring poor[5]. Rights not sustainable in law were to be allowed on proof of 60 years' usage[6]; but encroachments within 20 years before the inclosure were to be treated as invalid[7]. The consent of the lord of the manor was necessary to any enclosure[8]. The Commissioners had also power to rectify illegalities and inaccuracies from former Inclosure Acts.

The effect of this Act was to substitute the Inclosure Commissioners for a Committee of Parliament as the effective tribunal for enclosure, while the consent of Parliament was formally obtained by the submission to it in a general Inclosure Bill of all enclosure schemes approved by the Commissioners. The Act, which only extended to England and Wales, contained 168 clauses; and a large number of amending Acts were the inevitable result[9]. An Act of 1848 enabled the valuer for the enclosure to award money instead of land, if the land would be less than £5 in value[10], a provision which revives the evil

[1] § 15.
[2] Hansard 80, 28,
[3] § 74.
[4] § 149.
[5] §§ 30, 31, 73.
[6] § 54.
[7] § 50.
[8] § 29.
[9] e. g. 9 & 10 Vic. c. 70.
10 & 11 Vic. c. 111.
11 & 12 Vic. c. 99.
12 & 13 Vic. c. 83.
15 & 16 Vic. c. 79.
17 & 18 Vic. c. 97.
20 & 21 Vic. c. 31.
22 & 23 Vic. c. 43.
31 & 32 Vic. c. 89.
[10] 11 & 12 Vic. c. 99, § 3.

alluded to above[1]. In 1852 it was enacted that no land should be enclosed by the Inclosure Commissioners without the consent of Parliament, thus removing the distinction in the Act of 1845[2]. Between 1845 and 1867 schemes for nearly 900 enclosures under the Act were framed by the Inclosure Commissioners and sanctioned by Parliament[3].

The object of the Act was both to facilitate enclosures, and by bringing them under the supervision of judicial commissioners to protect the interests of the poor; while the provisions as to lands near large towns were designed to prevent the absorption of open spaces which might provide breathing places and play-grounds for their inhabitants. The Act was however insufficient to attain its purpose completely, so far as that purpose was to protect the interests of the community. The right of the lord of the manor to enclose the wastes of his manor under the Statute of Merton, provided he left sufficiency of pasture for the persons entitled to common, still remained. The gradual disuse of manorial courts removed a simple machinery for checking encroachments on the wastes; the lords acquired one by one the interests of freeholders and copyholders by purchase or otherwise; and changed ideas as to agriculture had the result that few but the very poor used their common rights at all. These commoners could not enter into a difficult and expensive legal contest with the lord of the manor, and so, either rightfully or wrongfully, the lord enclosed, buying up some rights, silencing other claimants with grants of part of the enclosed land, ignoring the poor.

There was one interest which might in several manors have preserved open spaces for the community. The Crown was the lord of some manors, such as Greenwich, which included part of Blackheath; it had forestal rights over other manors and their wastes, such as those which made up the Forests of Epping and Hainault. But the Commissioners of Woods and Forests regarded the matter solely from the pecuniary point of view; they considered they had no right to forego the smallest revenue for

[1] pp. 147—151, ante.

[2] 15 & 16 Vic. c. 79, § 1, ante, pp. 157, 158.

[3] List in appendix to Chronological Index of Statutes.

such an undefined object as the maintaining of open spaces for the public benefit. And so on Blackheath for an annual revenue of under £70 a year they allowed the surface of the heath to be ruined by gravel-pits[1]; and in Epping and Hainault they sold the Crown rights to the lords of the manors. This latter action first called the attention of Parliament to the question; a Commission in 1850, and a Select Committee in 1863, considered the matter. The latter reported in a spirit now happily almost extinct, that two courses were open: "either to discontinue the sale of the forestal rights of the Crown, and vigilantly to maintain those rights without regard to the question of cost, for the purpose of preventing further inclosures." This process however the Committee thought, if applied "to obstruct that process of inclosure to which the lords, commoners, and copyholders of the manors comprised within the forest are entitled in common with all other persons similarly situated, would not only be a course of doubtful justice, but might in accordance with the experience of the past fail in securing the desired object." They therefore recommended the second alternative; that the sanction of Parliament should be obtained to the enclosure of the remaining parts of the forest, ascertaining the rights of the several parties, and "securing an adequate portion of the forest for purposes of health and recreation."

Fortunately the House of Commons took a broader view of the matter, and by a resolution of Feb. 13, 1863, "prayed her Majesty that no sales to facilitate enclosures be made of Crown lands or forestal rights within 15 miles of the Metropolis. In consequence sales of such rights were discontinued; but the Crown officials did not consider it part of their duty to prevent enclosures by enforcing the rights they were forbidden to sell, so they folded their hands and did nothing, while enclosures prejudicial to their rights were made, and the Lords of Manors had not even the necessity of paying for the rights they invaded.

Meanwhile the growing wants of Londoners on the one hand, and the value of each metropolitan common as building land on the other, were leading to enclosures by lords of manors and to

[1] Evidence of Mr Gore: Select Committee of 1865, R. 390.

protests by neighbouring inhabitants in nearly every open space near London. The feeling was brought to a head and legislation was set in motion by a proposal by Lord Spencer, the lord of the manor of Wimbledon, to sell a large portion of Wimbledon Common, and with the proceeds to buy up the rights of the commoners, and to convert about 700 of the 1000 acres in the common into a permanently enclosed and regulated park for the benefit of the inhabitants. The inhabitants declined to be benefited in this particular way; the consequent discussion showed that Lord Spencer and the commoners took very different views of their respective rights; and with the local question there came to the front the whole problem of the principles on which open spaces near the metropolis should be dealt with.

Accordingly Mr Doulton in 1865 carried a resolution in the House of Commons:—"that it is the duty of Her Majesty's Government to take steps for the preservation of the commons and open spaces in and near the Metropolis"; and on Feb. 21, 1865, a Select Committee was appointed "to inquire into the best means of preserving for the public use the Forests, Commons and open spaces in and around the Metropolis." It presented its first report on April 3[1], to the effect that Lord Spencer's proposal for dealing with Wimbledon Common was undesirable: while it also recommended the immediate repeal of the Statute of Merton. The committee then took evidence as to the condition of most of the metropolitan commons; Clapham, Tooting, Wandsworth, Epsom, Blackheath, Hampstead, Hackney Downs and others; and presented a second and general Report in June, 1865[2]. After summarising the evidence they again recommended the repeal of the Statute of Merton, and added a general recommendation that no enclosure under the provisions of the Inclosure Acts should take place within the Metropolitan area; and they proposed the establishment of a Board to act as "Trustees for the preservation of commons and open spaces within the Metropolitan area" to obtain information and promote legislative action wherever necessary.

This Report resulted in the Act of 1866[3], a Government

[1] 1865, R. 178 [2] 1865, R. 390. [3] 29 & 30 Vic. c. 122.

measure brought in by Mr. W. Cowper, Chairman of the Office of Works. It applied to all Commons within the Metropolitan police district; and provided that no such common should be enclosed by proceedings before the Inclosure Commissioners, but that the Commissioners might on the application of the lord of the manor, or of any commoners, or the local authority[1], draw up a scheme "for the establishment of local management with a view to the expenditure of money on the drainage, levelling, and improvement of any metropolitan commons and to the making of by-laws and regulations for the prevention of nuisances and the preservation of order thereon." Each scheme was subject to a local inquiry and to submission to and approval by Parliament; and the local authorities or the Metropolitan Board of Works were empowered to contribute to the expense of such a scheme from the rates. The Act, it will be observed, still left it open to the lord to enclose under the Statute of Merton, or by agreement with the commoners, or by the sanction of the Court or Homage of the Manor under a custom of the Manor; and, as originally passed, following the legal principle that inhabitants as such had no rights of common, the only individuals, other than the lords and public bodies, who could initiate a scheme were the commoners. This limitation was protested against at the time, and was removed in 1869, when any twelve ratepayers of the parish in which the common lay were allowed by memorial to set the Commissioners in motion[2].

But the Committee of 1865 had another important result. The feeling its report aroused, and the state of things shown by the evidence before it, with the conviction that neither the Government nor the Inclosure Commissioners could be relied upon to protect the interests of either the public or the poor, led in the autumn of 1865 to the formation of a private Society to carry out those purposes, which, under the name of the "Commons Preservation Society", has achieved great results in preventing enclosures and encroachments on commons and open spaces.

[1] The Metropolitan Board of Works in cases where there was no local Board under the Public Health Act.

[2] 32 & 33 Vic. c. 107, § 3.

For by this time the great questions of the rights of the public in these commons, and of the importance to the community and especially to the inhabitants of great towns of the maintenance of open spaces in their neighbourhood, were coming to the front. If a lord of the manor and the commoners in his manor agreed on terms satisfactory to themselves to enclose a common near London, the inhabitants of the neighbourhood who had no rights of common would suffer injury on the deprivation of an open space and recreation ground in their neighbourhood: but had they any legal right to interpose? If they had not, was it desirable that such a legal right should be given to them or their representatives; and if so, were the lord and commoners who were prevented from enclosing entitled to any compensation for the loss of their legal rights. In answering these questions, the interests of individual landowners came into direct collision with the interests of the general public, and this conflict made itself felt in Parliament. Great diversity of opinion was shown in the Committee on Metropolitan Commons in 1869[1]: and in 1871 a compromise bill introduced by Mr Shaw Lefevre fell a victim in the Commons to the combined attacks of Radical advocates of the claims of the poor, and Conservative friends of the lords of manors. In 1872 a bill introduced in the House of Lords by the Earl of Morley was shipwrecked through the opposition of the advocates of the landowners, and the fates of the two bills show the contending influences at work.

The movement on behalf of the poor arose from a conviction that the Inclosure Commissioners did not use their powers under the Acts of 1845 to secure sufficient recreation grounds for the inhabitants, or allotments for the labouring poor of the neighbourhood. A Select Committee appointed in 1869 to consider this subject came to the conclusion[2] that at any rate much further information as to each proposed enclosure should be given to Parliament to enable it to judge of the sufficiency of the provision for the poor. Since 1845, 614,800 acres had been enclosed through the Inclosure Commissioners, of which only 2223 acres had been appropriated as allotments for the

[1] 1868—9, R. 333. I. [2] 1869, R. 304.

labouring poor, and 1742 acres as recreation grounds for the inhabitants. Out of 6900 acres to be enclosed by one scheme, 3 acres were reserved as a recreation ground for the public, 6 acres as allotment gardens for the poor. At Withypool out of 1906 acres, one acre was set apart as a recreation ground; and the Committee found that the decision of the Commissioners who made such a small reservation was formed on erroneous information[1]. It was on these grounds that Mr Fawcett and other radicals attacked Mr Shaw Lefevre's bill of 1871 from one side, while it was met on the other side by Sir M. Hicks Beach and the Conservative party with a great anxiety for further consideration of its provisions, which ultimately led to its being dropped. The Bill of the next year (1872) having passed the Commons, arrived late in the session at the House of Lords, and was rejected in Report of Committee on the ground that "it was an invasion of the rights of property in the case of lords of the manors[2]"..."a great interference with the rights of the existing lords of manors and commoners for the purpose of conferring the property belonging to certain individuals upon third parties, who had no legal *status*, or right to such property, whatever[3]": while one of the peers who supported the bill was sarcastically described by Lord Cairns as "the advocate of donkeys and geese."

Legislation however was forced upon Governments of whatever party by the fact that the Committee of 1869 had recommended that Inclosure Bills should be delayed till the recommendations of the Committee became law; and as this recommendation was acted upon by the supporters of the Committee's conclusions, many schemes of the Inclosure Commissioners were still waiting for approval. When therefore a Conservative Government came into office a bill was introduced by Mr Cross, which, as Mr Shaw Lefevre said, was "rather taken from the point of view of Lords of Manors[4]." It was accordingly met by an amendment on the second reading by Mr Shaw Lefevre[5] to the effect that the bill did not provide sufficient facilities for the regulation and

[1] Hansard, 205, 1150—2.
[2] Hansard, 212, 1864.
[3] *Ibid.* 491, Duke of Richmond.
[4] Hansard, 227, 195.
[5] Hansard, 227, 525.

improvement of commons in their present open condition, and that after the recent decisions in the law courts, throwing open illegal and arbitrary enclosures[1], no enclosures should be permitted except under the especial sanction of Parliament. Mr Fawcett moved another amendment on going into Committee[2], that the Bill "did not give adequate protection to the interests of the rural labourers and did not provide proper securities against the inclosure of those commons which it was desirable to preserve in their uninclosed condition for the use and enjoyment of the people." But both these amendments were unsuccessful. The agricultural labourers petitioned against the bill in great numbers and determined attempts were made in Committee to prevent as far as possible all enclosures except such as were made with the approval of Parliament. Mr Cowper-Temple proposed to stop all enclosures under the Inclosure Acts and only to allow the regulation of commons[3]; Mr Shaw Lefevre to stop any enclosures of commons, town greens or village greens unless sanctioned by Parliament[4]; Mr Cowper-Temple, that the Commissioners should not enclose any suburban common[5]; Mr Shaw Lefevre, to require at least one tenth of the common to be allotted to recreation or field-gardens[6]; Lord Edmond Fitzmaurice, to repeal the Statutes of Merton and Westminster the Second[7]; and Sir W. Harcourt, that the unlawful enclosure of any common should be deemed a public nuisance[8], which any individual therefore would be empowered to abate or destroy, whether he had rights of common or not. All these amendments aimed either at preventing enclosures, or at bringing them under Parliamentary control; and they all professed to be framed in the interests of the poorer commoners and the public: they were all rejected on the alleged ground that they were interferences with rights of property, and the bill passed without substantial amendments[9]. The preamble recites that the Inclosure Commissioners have power with the consent of

[1] i. e. Epping Forest, Plumstead, Berkhampstead Cases.
[2] Hansard, 229, 1219.
[3] Hansard, 229, 1387.
[4] *Ibid.* p. 1394.
[5] *Ibid.* p. 1525.
[6] *Ibid.* p. 1556.
[7] *Ibid.* p. 1566.
[8] *Ibid.* p. 1571.
[9] 39 & 40 Vic. c. 56.

Parliament to authorize the enclosure of commons "on such terms and conditions as may be proper for the protection of any public interests" if they are of opinion that such enclosure would be expedient having regard to:—(1) "the benefit of the neighbourhood", defined as "the health comfort and convenience of the inhabitants of any...populous places in or near any parish in which such commons are situate", and:—(2) to "private interests", defined as "the advantage of the persons interested in such commons"; and that it is desirable that Parliament should have full information to enable it to judge whether such enclosure will be of benefit to the neighbourhood, as well as to private interests; and that further facilities should be given for the provision of land for allotments and field gardens, and for the regulation, improvement and stinting of commons as opposed to their complete enclosure. The 39 clauses of the Act endeavour to carry these purposes into effect. The Inclosure Commissioners are empowered to frame schemes for the adjustment of common rights and the stinting or regulation of commons, for draining, levelling, planting and keeping order on the commons, for securing free access to points of view, the preservation of objects of historical interest, the maintenance within due limits of the privilege of playing games, and the construction of convenient roads and footpaths; and they are allowed to appoint Conservators for these purposes. The sanitary authorities of any town are to have a *locus standi* to protect the interest of the inhabitants in any neighbouring common. Further facilities are given for the provision of field gardens and recreation grounds. Encroachments on village greens are to be treated as public nuisances[1]; and where any person intends to enclose a common in any other way than under the provisions of the Inclosure Acts, he is to give three months' notice of his intention in a local newspaper[2]. With this Act the statutory history practically closes, though the battle of enclosures is fought every year in Parliament on Schemes of the Inclosure Commissioners, and private bills of Railway Companies and others, affecting commons and open spaces.

[1] § 27, *vide sub.* p. 174. [2] § 31, *vide sub.* p. 170.

CHAPTER VIII.

Needed Reforms.

Land over which rights of common exist at the present day may be enclosed in four ways:—

I. By the machinery of the Inclosure Commissioners, with the sanction of Parliament.

II. By Inclosures under the Statutes of Merton and Westminster.

III. By consent of the commoners, often expressed in a custom of the manor.

IV. Without any justification in law.

I. The Parliamentary method of enclosure, under the statutes just referred to, applies to all land over which any common rights exist, unless such land is in the metropolitan area or within a certain distance of towns of a certain number of inhabitants, or is a village green, in which case the Commissioners cannot deal with it. They are directed to investigate the way in which the proposed enclosure may affect both public and private interests, and to report fully to Parliament, which then has an opportunity of confirming, rejecting or varying the proposed scheme of enclosure. And subject to certain amendments in detail, this system, as far as it goes, seems satisfactory in its working, the Inclosure Commissioners having adapted themselves in a greater degree to the intentions of Parliament and spirit of the time than was the case in 1876 when Mr Fawcett attacked them.

II. The second method is under the Statutes of Merton

and Westminster, and against the wish of the commoners; in this method it devolves upon the lord to prove that he has left sufficiency of pasture for the commoners who have rights of pasture in the land. This is in some ways a dangerous method for the lord to use; for it is often very difficult to ascertain who are entitled to rights of common, and what consequently is sufficiency of pasture. Moreover if rights of turbary or estovers, i.e. of cutting turf or fuel, or rights of digging sand and gravel exist, the lord cannot approve by this method alone[1], except in places where no turf, timber &c. can possibly grow or be[2]; for the Statutes of Merton and Westminster only apply to common of pasture[3]. This method therefore only applies to lands where the only rights of common existing are common of pasture, and where the lord leaves sufficiency of pasture for the commoners[4]. Whether this is so or not is a very difficult and expensive question to determine, and, though the proof is in the lord, a commoner may well be excused from risking the enormous costs of a suit as to manorial rights for a right of common which is agriculturally of very small value. The lord is thus assisted by the worthlessness of the right; in the present days of high farming and careful breeding good cattle are not fed on the commons; the rights of common are but little used; and "sufficiency of pasture", which is estimated by recent user, is a fast diminishing quantity. In *Lascelles* v. *Lord Onslow*[5], the Court expressed the opinion that if the lord could prove that he had left sufficiency of pasture for all the cattle that had usually been put on the waste within the last 10 years, it was enough.

III. The third method is by the consent of the commoners, either individually obtained, or given by the custom of the

[1] *Fawcett* v. *Strickland*, Willes, 57; *Duberly* v. *Page*, 2 T. R. 391; Coke, *Inst.* II. 86.

[2] *Peardon* v. *Underhill*, 16 Q. B. 120.

[3] Coke, *Inst.* II. 86, from which it follows on the modern view, that there was no common law right to enclose against such rights; but see p. 65 *supra*, where that "Sufficiency of estovers" is left was held a defence; whether by Statute, Common law, or custom is not clear.

[4] It applies both to common appendant and appurtenant. (*Robinson* v. *Duleep Singh*, L. R. 11 Ch. D. 822.)

[5] L. R. 2 Q. B. D. 433: see also Robinson v. Duleep Singh, *ubi supra*.

manor through their representatives in the manor-court. As to individual assents, they are almost impossible to obtain; some commoners out of the number being almost always legally incapable of consenting through infancy, limited interest, or other disability. Customs of the manor are more efficacious; there may be a custom to enclose against a right of turbary or estovers, if sufficient is left for the commoners[1]. In other manors there may be a custom of the manor for the lord to enclose parts of the waste either as freehold or copyhold, provided he has the consent of the homage; or on the presentment of seven copyholders, agreed to by the majority of the homage at the next Court[2]. The homage are chosen from the freehold and copyhold tenants, but can only bind those they represent[3].

Of this method of enclosure again we may say that legal proceedings to test its validity are long, intricate and expensive, even if the enclosure is invalid. Both this and the preceding method are free from Parliamentary control and apply even to lands which Parliament has forbidden the Commissioners to enclose. An attempt has been made to impose some check on and demand some publicity for these enclosures, by the Commons Act, 1876, which requires any person intending to enclose or approve a common otherwise than under the Inclosure Acts to give notice by three advertisements in a local newspaper at least three months before the enclosure[4]; but as no penalty is provided for the failure to give such a notice, and the enclosure is not rendered invalid by the absence of such a notice, it is not very efficacious as a substitute for Parliamentary control.

IV. Lastly encroachments, even complete enclosures, are made without any show of legal right, either by poor squatters who build a wretched hut on the common and fence in a little land round it, or by lords of the manor or neighbouring proprietors, who enclose, relying on their wealth and position to

[1] As in *Arlett* v. *Ellis*, 7 B. & C. 346; *Lascelles* v. *Lord Onslow*, 2 Q. B. D. 433.

[2] *Lady Wentworth* v. *Clay*, Cases temp. Finch, 263; *Folkard* v. *Hemmett*, 5 T. R. 417.

[3] *Commissioners of Sewers* v. *Glasse*, L. R. 19 Eq. 134; *Lascelles* v. *Lord Onslow; vide supra.*

[4] 39 & 40 Vic. c. 56, § 31.

frighten opponents from commencing what may prove ruinous legal proceedings to restrain them. The action of the small squatters has only this to recommend it that sometimes their industry reclaims almost worthless land, the possession of which makes them industrious and self-supporting members of the community instead of labourers dependent on the farmer, and with very little hope of bettering themselves, or possibility of making provision for their old age. But the action of men of position who enclose thus has no relieving features; it is simply robbery relying on might and wealth and pursued for purely private advantage.

To all these methods the same remark applies that the existence of the rights of individual commoners affords no security that the legality of any enclosure will be investigated or its illegality exposed and checked. Here and there, almost by accident, a commoner may be found wealthy and public spirited enough to fight an expensive battle for rights of small value to himself as an individual. To the accident that the Corporation of London owned a cemetery, to which rights of common in the Forest of Epping attached, and were willing to fight a case that lasted 23 days against the lords of the 18 manors that made up that Forest, without any help from the Crown who also had rights over the land, we owe it that Epping Forest is to-day an open space dedicated to the public for ever[1]. The labourer Willingale by great personal and pecuniary sacrifices and help from others could partially defeat the lord of the manor and call public attention to the matter[2]; but only a public body like the City Corporation[3] could incur the enormous expense of a case, which, expensive as it was, did not, except on interlocutory proceedings, go beyond the Courts of First Instance.

So also Sir Julian Goldsmid's wealth and public spirit enabled the commoners of Plumstead to resist successfully the enclosures made by Queen's College, Oxford, in a case lasting

[1] *Commissioners of Sewers* v. *Glasse*, L. R. 19 Eq. 134: (interlocutory), 7 Ch. 456. See also *Chilton* v. *Corporation of London*, L. R. 7 Ch. D. 735.

[2] *Willingale* v. *Maitland*, L. R. 3 Eq. 103.

[3] *O si sic omnia!*

six days before the Master of the Rolls, and seven days on appeal[1], as to which Lord Hatherley said:—"The litigation has been occasioned by a high-handed assertion of right on the part of the College, who really seem to have said in effect to those who had been exercising their rights for 200 years: 'You will be in a difficulty to prove how you have exercised them; we will put you to that proof by inclosing and taking possession of your property'. I think therefore the whole expense ought to fall on those who have occasioned it, those who have brought into question rights which have had so long a duration[2]."

Again when Lord Brownlow enclosed Berkhampstead Common, it was due to the presence of a commoner with the courage, the energy and the means of Mr Augustus Smith, M.P., who organised an armed expedition of navvies proceeding by early special train from London to throw down the fences[3], and who afterwards fought two long and expensive actions[4], which terminated in the judgment by Lord Romilly that "the attempt of Lord Brownlow was only a renewal of the attempts made in 1638 and 1642, which did not end till 1654, to enclose exactly the same land, or nearly so, which encroachment was then resisted, and for which there appears to me to be as little justification now as there was in the 17th century."

Recent suits have resulted in the defeat of would-be enclosers of Banstead Downs, and the success of enclosers of Wallington Corner, both open spaces near the metropolis. But while in some cases there has been successful opposition, in how many, piece by piece, strip by strip, have wastes and open spaces over which common rights existed, disappeared, because no commoner was strong enough or wealthy enough to fight the encloser about a right of small value to any individual, though its maintenance secured great advantages to the public.

But, it will be urged, if these rights are of such small value, may not the commoners be quite right in not fighting about them, and need they be preserved? This raises the broad

[1] *Warrick* v. *Queen's College, Oxford*, L. R. 6 Ch. 716; 10 Eq. 105.

[2] 6 Ch. at p. 732.

[3] Mr George Burney made a similar raid in Epping Forest.

[4] *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241.

question of the position of the public in regard to these open spaces; and it may be conceded that over them the public have no rights recognised in law, or which could be enforced in a Court of Law. Owners and occupiers of commonable tenements may have rights of common; inhabitants of a village may have lawful customs of recreation of village greens[1]; there may even be public rights of way in defined tracks across the commons; but a right of walking or of recreation over the whole common, in no defined paths or places, claimed for the whole public, will not be recognised by any court of law. Still the fact remains that it is a vital interest of the people who live in England, that, especially near large towns, open spaces for air and recreation should be maintained: the existence of these common rights helps to maintain such open spaces, which would otherwise be built upon for the advantage of the land owner, still open for the benefit of the community; and therefore the maintenance and enforcement of these rights, often worthless to the individual, is a matter of grave public concern, and the public are interested in procuring the following alterations in the law.

(1) *That all enclosures, wherever to be made, should require the sanction of the Inclosure Commissioners and of Parliament.* There seems no valid reason why Parliament, having made its approval a condition precedent to all enclosures made in one way, should stand by when they are effected by another method, because in theory the Courts of Law are open to commoners whose rights are violated, though in practice there are great inducements to the commoners not to enforce those rights. This end would be attained by the repeal of the Statutes of Merton and Westminster the Second, a repeal already recommended by committees of the House of Commons; and by an enacting clause that no enclosures should be made under any pretence unless through the machinery of the Inclosure Commissioners and with the sanction of Parliament.

(2) As Parliament has recognised that the public have an interest in enclosures, by the machinery it has already provided,

[1] *Abbot* v. *Weekly*, 1 Lev. 176; *Hall* v. *Nottingham*, L. R. 1 Ex. D. 1.

it should strengthen the securities that the law should be obeyed, by enabling others than commoners to enforce that law. This might be effected, as has been already proposed *by making all illegal enclosures of commons public nuisances*, which anyone may abate or prosecute, a proposal which, as regards village greens, is already law. The same end might be attained if the Inclosure Commissioners had similar functions assigned to them, and were directed to investigate and if necessary to prosecute, abate, or proceed civilly in respect of all encroachments on Commons.

Against these proposals it will be urged at once that they confiscate rights of property, and deprive lords of manors of their legal rights to make their profit by enclosures, commoners of their right to consent to such enclosures; and it is said that such rights should not be destroyed without compensation to their owners. I think that neither on considerations of law or of public policy should such compensation be given. The ownership or the legal rights of an individual over land stand on a different footing from any other class of property; for land is essential to the existence of the English people. Landlords may own it; the English people have to live on it; and it can hardly be supposed that the community will create and protect as against itself rights in the land which are injurious to the community. It may be that by the letter of the law the owner of a large tract of land in London can, subject to public rights of way, keep his land uninhabited; but if he were to attempt to do so in practice, the law would not remain so for a week, and I do not think the landowner would get any compensation for "forcible disturbance" in the exercise of his legal rights. It may be that the owner of Great Gable, Ben Nevis or the Glyders can prohibit all persons from walking on his land; but if he or any number of owners of mountain tracts seriously pretended to do so, some such bill as Mr Bryce's Access to Mountains Bill would be carried at once, and I doubt whether the landowner would receive compensation for his loss. It is now an accepted maxim of public policy that open spaces should be preserved for the health and recreation of the community, metropolitan commons for their short holidays, mountain dis-

tricts for their long vacations; and the fates of the proposed Ennerdale and Borrowdale Railways and of the Hayling Common Inclosure Scheme in recent times show how Parliament carries out that policy. England, with no open spaces, with its inhabitants condemned to a peripatetic existence on high roads, or a doubtful privilege of walking by the seashore, would be a country where a few of its citizens were by the law allowed to injure the community by the exercise of their legal rights, and by claiming compensation for the loss of those legal rights, to take money for refraining from injuring their fellow citizens. It is moreover doubtful whether the rights to be destroyed are in many cases of any serious value. Many enclosures attempted have proved to be illegal, and where commoners oppose it is rare that an enclosure can legally be carried out. Then too the surrounding property of the lord of the manor is often increased in value by the existence of the open spaces, and in this way he pecuniarily benefits by their maintenance, so that the principle of some colonial legislation may well apply, that a landowner, whose land is taken for public purposes, shall not claim compensation without deducting the amount to which the rest of his land is benefited by the public improvement.

I think therefore that the sanction of Parliament should be required to all enclosures; that further means should be provided for the prevention of illegal enclosures; that the policy of preserving open spaces should steadily be pursued by Parliament, and that, if the rights of individual landowners are restrained in the interest of the public, those individuals should have no claim on the public for compensation.

There is one relic of the old policy of enclosure that may well be redressed by Parliament. Too great attention was in former times directed to agricultural profits and individual advantage, too little to social and moral results and the condition of the poor. Enclosures "made fat beasts and lean poor people." The agricultural labourer in many cases is destitute of an interest in the land, and without hope of any such interest in the future. Measures which would place the ownership of small plots of land more within his reach would

increase the stability of England by increasing the number of her landowners, and would raise the character and increase the industry of the labourer by giving him a stake in the land he lives on and cultivates. Individual landowners such as the Marquis of Lansdowne, Lord Tollemache and the Earl of Onslow have done much in this respect on their own estates; but a general law is still wanted to redress the evils into which too great attention to one aspect of enclosures led our ancestors[1].

Those times are gone: the interests of the public and the poor are now in small danger of being neglected if they are brought to the attention of Parliament; there is further needed an alteration of our legal machinery to ensure that dealings with the land of England, which may seriously affect the welfare of its people, shall not be permitted without the sanction of the representatives of the people.

[1] Written February, 1887. A measure (50 & 51 Vic. c. 26) dealing with this subject became law this session, and is referred to in the Preface hereto.

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